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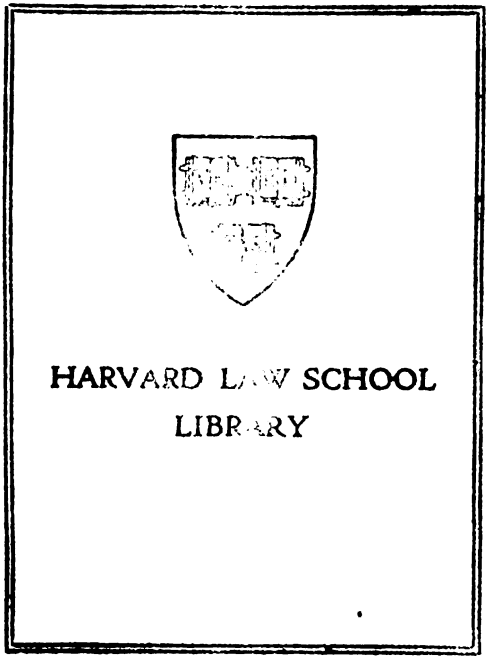
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HOWARD'S

PRACTICE REPORTS

IN THE

SUPREME COURT

AND

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

By R. M. STOVER,
REPORTER.

VOLUME LII.

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ERRATUM.

In the case of *Lucusterine Fertilizer Company* agt. *Stilwell* (*ante, page* 152), in the second paragraph of head-note and first line read "*Royal U.;*" *S. C.* (*page* 153), in the first line of the opinion read "*Royal U.;*" and in the third line from top of page 153, read "*H. C. Gardiner.*"

PRACTICE REPORTS.

SUPREME COURT.

JOHN MORRIS and another agt. EDMUND J. PORTER and others.

Will — execution and publication thereof — what proof sufficient — Devise — when void for illegal suspension of alienation.

Where M., about to execute her will, sent for B. to be a witness thereto, who, when he came into the presence of M., the will lying on the table before her, was asked by P., who had written the will, to sign it as a witness to her will, such request being made in the hearing of M., B. then signed the will as a witness in the presence of M., who said, "thank you;" the witness B. testifying that he did not see M. sign the will, and could not say whether or not her signature was to the will when he signed it, the other witness, P., testifying that M. signed the will in the presence of all the witnesses:

Held, that the positive recollection of one witness will not be overcome by the non-recollection of the other, and that the certificate of a deceased witness that the testatrix "had signed, published and declared the instrument to be her last will and testament in the presence of the witnesses," should be received as evidence and have a controlling influence under the circumstances of this case; and that it thus appearing that the signature of M. was to the will when B. signed as a witness, the execution of the will was sufficiently proven.

The will contained a clause in these words "I do hereby give and bequeath the income, or incomes, arising from all my real estate to my children living at the time of my decease to have and to hold the same during the term of each of their natural lives; and at the decease of my said children I give and bequeath to my grandchildren all my said real estate, share and share alike, to have and to hold the same forever. And it is my will and desire that my said real estate is not to be sold during the lives of said children."

Held, that the devise was void for the reason that, thereby, the absolute power of alienation of the real property was suspended for a longer period than the continuance of two *lives* in being at the death of the testatrix.

Special Term, May, 1876.

Morris agt. Porter.

THIS is an action for the construction of the will of Anne Morris, deceased, late of the county of Kings, and for the partition of her real estate in the event that the devise made thereof should be held void.

The testatrix made a will in the year 1867 in which she made an attempted disposition of the real estate in question; and afterward, and in the year 1871, she made another will by which she sought to revoke the will of 1867.

The surrogate of Kings county held that the will of 1871 was not properly executed and admitted the will of 1867 to probate. Evidence was given in this action by the parties as to the execution of the will of 1871 which, as it affected real estate, was here sought to be established. The facts appear by the opinion.

Varnum, Turney & Harrison, for plaintiffs.

D. & T. McMahon and E. J. Porter, for defendants Porter and others.

A. B. Simonds, for guardian *ad litem* for infant defendants.

Wakeman & Latting, for defendant Partridge.

Huntley & Adams, for defendant Vanderbilt.

VAN VORST, *J.* — The plaintiffs in their complaint insist that the paper subscribed by Anne Morris on the 13th day of June, 1871, as and for her last will and testament, was not duly executed by her and is not her will. That she did not sign the paper in the presence of the witnesses thereto, and did not acknowledge to them that the same was her last will and did not request them to witness the same.

On the other hand, the defendants Richard Morris and wife claim that the instrument was executed and published by the testatrix, as and for her last will and testament, in the presence of the witnesses in conformity with the statute.

There are three witnesses to the will, viz., Hannah M. Roope, Edmund J. Porter and Franklin Bradley. The testimony of one of the witnesses, Hannah M. Roope, was unavailable she having departed this life before the trial.

The will in question, according to the testimony of Edmund J. Porter, one of the witnesses, was written by him at the request and under the direction of the testatrix, and before its execution was read by him to her in the presence of Hannah M. Roope. Porter then told the testatrix that it was necessary to have witnesses. Testatrix replied that Hannah M. Roope would be one of the witnesses, and she requested Porter to be another. Testatrix then sent Hannah M. Roope out to summon Franklin Bradley to be another witness. Porter testifies that when Bradley came in Mrs. Morris stated to the witnesses that the paper was her last will and testament and asked them to become witnesses thereto. That she then signed her name and then Hannah M. Roope signed her name, then Porter and Bradley each also signed. Porter testifies that the testatrix was in the possession of all her faculties at the time.

Upon his cross-examination Porter testified that, according to the best of his recollection, Bradley came in before the will was signed by the testatrix.

The witness Bradley, when shown the will, testified that his signature thereto was genuine; that he was called from his business by Hannah M. Roope to witness *that* will; that there were present at the time the testatrix, Hannah M. Roope, John Morris and Mr. Porter. They were all sitting around the dining-room table. There were others present. That when he came in the room the testatrix said to him "good morning;" that he was then asked by Mr. Porter to sign that will; that he then took the pen and signed it. He saw that there were two other witnesses to it. Mrs. Morris, according to Bradley's testimony, did not say any thing about the will. The will was lying on the table as he came in. It was taken up and handed to him by Mr. Porter who

called his attention to it as the will of Mrs. Morris. All the parties were in the hearing of each other. Bradley says that Mrs. Morris saw him sign the paper, and after he had signed it she said to him "thank you." He did not *see her sign it; could not say whether her signature was there at the time or not.* Mr. Porter, who was sitting between Mrs. Morris and John Morris, handed the paper to him across the table and told him where to sign. When he came in the room Mr. Porter said, in substance: "We have sent for you to sign, as a witness, Mrs. Morris' will." Mrs. Morris heard the conversation. Bradley says: "Mrs. Morris was in the possession of her faculties; that she had always been noticed for the clearness of her faculties."

If the testimony of Porter had been corroborated in its essential facts by Bradley, no question could have arisen as to the proper execution of the will. But there is some want of agreement between these witnesses in an important particular. Porter testified that Mrs. Morris signed the will in the presence of each of the witnesses. Now, while there is not the least doubt but that Bradley, at the time he signed as a witness, understood and believed the paper to be her last will and testament, nor but that he signed the same as a witness at her request, such request being communicated to him by Mr. Porter in her presence and with her assent; yet Bradley testifies that Mrs. Morris did not subscribe the will in his presence, and he could not say whether her signature was there or not; *he did not see it.* There is no positive evidence of any distinct statement or acknowledgment on the part of Mrs. Morris, in the presence of all the witnesses, that she had subscribed the same. Execution and publication are distinct and independent acts. Mere publication, without any other act, is not a sufficient acknowledgment. Had it distinctly appeared by the evidence of Bradley that the will, when handed to him by Porter in the presence of Mrs. Morris, bore her signature accompanied by the request that he should be a witness to it as her will, that would,

doubtless, have been an acknowledgment of the subscription of the will by her within the meaning of the statute (*Baskin* agt. *Baskin*, 36 *N. Y.*, 416; *Willis* agt. *Mott*, 36 *N. Y.*, 486). In *Newhorn* agt. *Goodwin* (17 *Barb.*, 236) it was held that the positive recollection of one of the witnesses will not be overcome by the non-recollection of the other. If Porter had simply sworn that the signature of Mrs. Morris had been already affixed when Bradley signed, it would have been, at most, a case of non-recollection. But Porter states on his direct-examination, that the testatrix signed in the presence of all the witnesses and before they signed. Bradley does not swear that the signature of the testatrix was not there when he signed; he could not say whether it was there or not. But the positive evidence of Porter, that the testatrix signed the will before the witnesses affixed their names, includes certainly an averment that the signature of Mrs. Morris was to the will when Bradley signed, and that under the case of *Baskin* agt. *Baskin* (*supra*) is sufficient (*See, also, valuable note to Pearson* agt. *Pearson*, 4 *English Reports*, 680, *in which the cases on the subject are collected by Mr. Moak*).

But I am inclined to give a controlling influence in this case, to remove any doubt upon the subject, to the certificate of Hannah M. Roope, the deceased witness, appended to the will. This witness had been residing with the testatrix, as a friend to take care of her, for a period of some fifty years. Her certificate is entitled to much weight, from her relation to the testatrix.

Her signature, as a witness to the will, is proved by both Bradley and Porter. Porter swears that he saw her sign her name, and that after the testatrix had signed. The certificate states that the instrument was "signed, published and declared by Anne Morris, the testatrix, to be her last will and testament, in presence of us, who have signed our names, at her request, as witnesses, in her presence, and in the presence of each other." This attestation, with the

other facts and circumstances, warrant a finding of the due execution of the will (*Orser* agt. *Orser*, 24 *N. Y.*, 51).

This conclusion is strengthened by the fact that Mr. Porter is a counsellor at law, and familiar with such subjects. He had drawn a will for the testatrix in 1867, which the will of 1871 was designed to displace. He had been charged with the preparation of the will, and to be present at its execution, and by the further fact that the testatrix was confessedly in the enjoyment of all her mental faculties, and knew that the paper signed by her and the witnesses was signed and published by her as her last will and testament.

The plaintiffs make the further objection that the alleged will, even if properly executed by Anne Morris, makes no valid disposition of her real estate, and as to the same is wholly void and of no effect, for the reason that thereby the alienation of the real estate, devised thereby, would be suspended for a longer period than the duration of two lives, in being at the time of the death of the testatrix, to wit, during the lives of four children. The clause of the will, from which the result above suggested is claimed to follow, is in these words: "I do hereby give and bequeath the income, or incomes, arising from all my real estate, to my children living at the time of my decease, to have and to hold the same during the term of each of their natural lives, and at the decease of my said children, I give and bequeath to my grandchildren all my said real estate, share and share alike, to have and to hold the same forever. And it is my will and desire that my said real estate is not to be sold during the lives of said children, and they are to receive the income quarterly, *from my executors*, hereinafter named, provided, nevertheless, the same is collected in such manner."

The testatrix left her surviving four children and several grandchildren.

In order to determine whether the devise in question is open to the objection, that the absolute power of alienation is suspended by a limitation or condition for a longer period

than during the continuance of two lives in being at the creation of the estate, the language of the will is to be carefully considered so as to determine its effect and ascertain the intention of the testatrix, which must control. Such construction, however, should be adopted, if fairly to be gathered from the terms of the will, as will uphold, rather than adjudge it void, as favoring a perpetuity condemned by the statute.

First, then, it is clear that the income arising from all the real estate of the testatrix is given to her four children living at the time of her death, to be had and held by them during the term of each of their natural lives. This is a complete devotion of all the income of all the real estate to these four children, to the end of the life of the survivor of them.

The income of the whole real estate thus being given to the four children of the testatrix during the lives of each and all of them, it is quite clear that it was the intention of the testatrix by such disposition, that the same should not be alienated or disposed of at any time while such children lived.

In fact, the will of the testatrix in express terms is: That her real estate should not be "sold during the lives of said children." At the decease of her children, which must mean all her children, as each of them is to share in the income, which would of necessity include the last survivor, the real estate is devised to her grandchildren, share and share alike, to have and hold the same forever. If the real estate was inalienable before the death of the last survivor of the four children, at which event the devise to the grandchildren takes full effect, then the will creates a suspension for a period longer than the continuation of two lives, and the devise is void (*Revised Statutes, section* 15, *art.* 1, *tit.* 2, *and chapter* 1, *part* 2; *New York Statutes at Large* [*Edmonds*], *vol.* 1, *page* 672, *section* 15; *also section* 14; *Colton* agt. *Fox*, 6 *Hun*, 49; *Coster* agt. *Lorillard*, *supra*, *page* 265).

The power of alienation by the fourteenth section of the

Revised Statutes, above referred to, is suspended "when there are no persons in being by whom an absolute fee in possession can be conveyed." At most, the four children of the testatrix could convey only an interest in the lands for their lives. But such conveyance would be in opposition to the express terms of the will, which creates their interest. This, therefore, they could not do. But it may be doubted whether they have an interest in the land, other than in the income arising therefrom. The will of 1867 in terms gave *the land*, as well as the income thereof, to the children for their lives, and devolved no duty upon the executors.

The will under consideration provides that the children are to receive the income quarterly from the executors. As executors, as such, have no power to collect accruing rents of the real estate, there may be an implied power in them to receive the rent in trust to pay over during the lives of the four children. They could not pay over, unless they were authorized to and did receive the income (*Vail* agt. *Vail*, 4 *Paige*, 328). If there be such trust in the executors, it is quite clear that they could not convey during the lives of the four children. It is not necessary, however, to decide that, for in no event could an absolute conveyance in fee of the premises be made, unless the grandchildren, the devisees of same, joined therein. But the grandchildren cannot make an effective conveyance, for the reason that it cannot be ascertained until the death of the surviving child of the testatrix, who will eventually take the estate.

The rule is, that a devise to a class of persons takes effect in favor of those who constitute the class at the death of the testator, unless a contrary intention can be inferred from such extrinsic facts as may be entitled to be considered in construing the will (*Campbell* agt. *Raudon*, 18 *N. Y.*, 412).

In *Collin* agt. *Collin* (1 *Barb. Ch.*, 631), it is held that where an estate is to be distributed among a class at the death of a particular person, or upon a contingency which may happen at any time subsequent to the death of the testator, all

who answer the description of the class, at the time appointed for distribution, will be entitled to a share in the fund.

When the language of the will indicates a present bequest of a fund, which is to be distributed at a period subsequent to the death of the testator, those who are *in esse* at the time of the death will take a vested interest, but subject to open and let in others who may come into being, so as to answer the description, and belong to the class at the time appointed (*Kilpatrick* agt. *Johnson*, 15 *N. Y.*, 322; *Tucker* agt. *Bishop*, 16 *N. Y.*, 402; *Johnson* agt. *Valentine*, 4 *Sandf.*, 36). There is nothing in the will which would exclude grandchildren, born after the death of the testatrix, from participating in the devise of the real estate. Interested in the fee, such subsequently born grandchildren must needs unite in a conveyance to make an absolute and perfect title, from which it follows, that the power of alienation is suspended by the devise beyond the time limited by the statute, and the same is void.

But it is urged, on the behalf of the defendants who uphold the will, that section 17 of article 1, title 2, part 2, chapter 1 of the Revised Statutes, applies to this will, and that, after the death of the second life tenant, being one of the successive estates for life, upon which the remainder is limited, the remainder to the grandchildren will take effect in the same manner as if no other life estate had been created.

The object of this statute was to carry out, by the doctrine of *cy-pres*, the intentions of the testator, as far as possible, upon the presumption that the successive estates were given in the order of preference.

But in this case it is clear that the testatrix intended no such preference, and that, on the contrary, her whole intention would be defeated, if two of her children should thus lose their life estates; and there is no equity in attempting to apply the doctrine of *cy-pres* here, nor can the court decide that the life estates of the last two survivors should be eliminated. The gift was to a class, without preference or distinction, and this being clearly the intention, and an

essential part of the general scheme of the will, the whole devise must fail (*Knox* agt. *Jones*, 47 *N. Y.*, 398, *opinion of* ALLEN, *J.*; *Coster* agt. *Lorillard*, *supra*; *Manice* agt. *Manice*, 43 *N. Y.*, 303).

The objections above mentioned, to the will of 1871, that, by force of the devise therein contained, the absolute power of alienation of the real estate of the testatrix is suspended for a longer period than is prescribed in the statutes, applies with equal force to the will of 1867.

The conclusions which I have reached are, that said wills make no valid disposition of the real estate in question, and that the same, upon the death of Anne Morris, descended to her heirs at law, unaffected by the devises thereof attempted to be made thereby; and that there be a partition and division of said premises among the parties to this action, according to their respective rights and interests therein, as above announced, and if a partition thereof cannot be made without material injury to the rights of the parties, then that the premises may be sold, under the direction of this court, and that the proceeds of sale may be divided among the parties, according to their respective rights and interests, as above expressed.

The findings of fact, and conclusions of law, to be prepared by the plaintiffs' attorneys, and served upon the defendants' attorneys, will be settled and signed upon due notice, when the costs and allowances will be adjusted and allowed.

SUPREME COURT.

MURTAUGH DEMPSEY agt. MITCHEL LEPP.

An action for malicious prosecution may be maintained for instituting civil suits, where the suits are commenced maliciously and without probable cause and terminated in favor of the plaintiff.

In such a case an order of arrest, under section 179 of the Code, is authorized.

Albany Special Term, October, 1876.

MOTION to vacate an order of arrest.

The complaint alleged that the defendant, on the 8th day of July, 1876, maliciously intending to injure the plaintiff in his good name and otherwise, and without reasonable or probable cause, procured and caused to be served a summons from the "justices' court of the city of Albany," directed to the defendant, returnable on the fourteenth day of July, then instant, to answer said Lepp for debt, damages $200 or under. On the return day, Lepp appeared and declared for fifty dollars damages for an injury to his cow. Issue was joined, and the cause was adjourned for one week, when said Lepp appeared and voluntarily discontinued the suit and paid the costs. The complaint also set out two other suits commenced in the name of one Julia Lepp, the wife of Mitchel Lepp, against the plaintiff, before one David Couse, justice of the peace of the town of Bethlehem, for the same alleged cause of action, and both of which were discontinued by said Mitchel Lepp. It also alleged adjournments in one of the last mentioned suits. It also alleged that such suits were malicious, unfounded and unjustifiable, without probable

cause, were instigated by the defendant, and that the plaintiff was greatly injured. The complaint was verified.

The affidavits supported the allegations in the complaint, and also showed that Lepp had no interest in the cow in question; and had declared that he commenced the several suits "to get even with Dempsey;" also, Lepp said on one occasion (speaking of the matter to Dempsey), "I will bring you again and again and again." The affidavits also showed that Lepp could have tried either of the three cases upon any of the days when the parties appeared, as Dempsey was ever ready, but refused to do so.

Upon the complaint and affidavits, honorable Thomas J. Van Alstyne, county judge of Albany county, granted an order of arrest, directing the defendant to be held to bail in the sum of $300. The defendant now seeks to have said order of arrest vacated.

Mr. Malley, for the motion, cites the following cases: 2 *Wils.*, 305; 1 *Salk.*, 14; 1 *B. & P.*, 205; 1 *Chitty Plea.*, 136; 2 *id.*, 191; 1 *Bacon Ab.*, 96; 15 *Abb.*, 127; 6 *Abb.* (*N. S.*), 9, 23; 39 *How.*, 432, 439; 56 *N. Y.*, 451; *Code, secs.* 178, 179, 181, 204.

Edward J. Meegan, in opposition thereto, for the plaintiff, urged:

I. To sustain malicious prosecution of a civil suit there need be no arrest (1 *Hill on Torts*, 422, 435, 451; 2 *Add. on Torts*, 752, *and note n.*; 1 *Wend.*, 345; 41 *Barb.*, 290).

II. The three elements of malicious prosecution — *a.* The termination of prosecution in favor of the plaintiff. *b.* Want of probable cause. *c.* Malice. — concurs in this case (10 *N. Y.*, 236).

III. The voluntary discontinuance of civil suit throws upon defendant the burden of showing probable cause (19 *Wend.*, 417), and the abandonment of charge sufficient (36 *N. Y.*, 11; *Van Santvoord's Plead.* [*Moak's ed.*], 370).

IV. The case is a proper one, under section 179 of the Code, for an order of arrest (4 *Bosw.*, 627; 4 *How. Pr.*, 234; 3 *Code R.*, 9; 1 *Wait's Prac.*, 615).

WESTBROOKE, *J.* — This motion, by stipulation, was heard only on the affidavits upon which the order was made. It is an action for a *tort*, and can be regarded as an injury to the person as well as an action for seduction or criminal conversation.

Motion to vacate order of arrest denied.

N. Y. COMMON PLEAS.

William W. Smith agt. Rufus C. Read.

Boarding-house keepers — liability of — negligence.

A boarding-house keeper is liable for the loss of his guest's goods, occasioned through the negligence of his own servants while they are acting within the scope of their employment.

It is incumbent on a boarding-house keeper to exercise due and proper care of the baggage or property of his boarder — such care as a prudent person would take of his own property.

It seems that the rule that a master is liable to third persons for the negligence of his servants while acting within the scope of their employment, is equally applicable to boarding-house keepers.

General Term, December, 1875.

Before Daly, *Ch. J.*, Loew *and* J. F. Daly, *JJ.*

Appeal by the defendant from a judgment for $102.76, besides costs and extra costs, rendered in favor of the plaintiff by the second district court of the city of New York.

Francis Byrne, for defendant.

William D. Foulke, for plaintiff.

Loew, *J.* — It appears, from the evidence, that the defendant is a boarding and lodging-house keeper, and that the plaintiff had been boarding and lodging with him for some time prior to the 20th day of March, 1873. On the morning of that day, the plaintiff left his room as usual, and on his return in the afternoon he found that a dress coat, a seal skin

cap and some articles of jewelry had been taken from it during his absence. He made inquiries of the defendant's housekeeper as to what had become of the goods, and she informed him that they must have been stolen by a colored man whom she had employed to clean the shutters; that she had never seen him before the previous day when he put in some coal for her; that she had permitted him to go into his (the plaintiff's) room alone; that it was very careless of her to do so, but that as the other rooms were occupied by ladies and others, it never occurred to her that his (the plaintiff's) was unoccupied.

As it further appears in evidence that the negro employed by the defendant's housekeeper never called to obtain payment for the services he had rendered, and as he could not be found at the place where he had told her that he resided, there can be but little doubt that he committed the theft of the plaintiff's goods. Nor do I think that it can be seriously questioned that the defendant's housekeeper was guilty of negligence in permitting a person who was a stranger to her, and of whom she knew absolutely nothing, to remain alone in the plaintiff's room, where the goods of the latter were exposed to his cupidity, and where he had ample facilities for theft.

The only question, therefore, presented for our consideration and determination in this case is, whether a boarding-house keeper is liable for the loss of his guest's goods, occasioned through the negligence of his own servants while they are acting within the scope of their employment? This point was much discussed in the case of *Dansey* agt. *Richardson* (3 *El. & Bl.*, 144). The question there was, whether the defendant, a boarding-house keeper, was responsible for the loss of a dressing case belonging to a boarder, which was placed in the hall just previous to the guest's departure, from which place it was stolen by a thief, who entered by the hall door which had been negligently left open by one of the boarding-house keeper's servants. The cause was tried

before ERLE, J., who instructed the jury that a boarding-house keeper was not bound to exercise more care of her guest's property than a prudent person would take of her own; and that the defendant was not liable unless she was guilty of negligence in hiring or keeping the servant. A verdict was given for the defendant. On a motion for a new trial, on the ground of misdirection, the whole court held that it was incumbent on a boarding-house keeper to exercise due and proper care of the baggage of his boarder — such care as a prudent person would take of his own property; and that leaving the hall door open might be a want of such care, and that so far the instruction to the jury was correct. But upon the other point the judges were equally divided. Lord CAMPBELL, Ch. J., and COLERIDGE, J., were of the opinion that the defendant was answerable for the negligent act of a servant in her employment as well as her own personal negligence; that no distinction was to be made between the two, and that, therefore, the direction was erroneous. On the other hand, ERLE, J., and WIGHTMAN, J., held that the defendant was not liable for the negligence of her servant unless she was herself negligent in hiring or keeping a careless or imprudent servant, and that, consequently, the direction was correct.

Subsequently, the case of *Holder* agt. *Goulby* (8 *C. B. Rep.* [*N. S.*], 254), came before the court of common pleas, and ERLE, Ch. J., and BYLES and KEATING, JJ., held that the keeper of a lodging-house was under no obligation to take care of his lodger's goods, and was not responsible for their loss. In that case, the lodger's property was stolen by a person who, in his absence, was permitted by the lodging-house keeper to see the rooms with the view of hiring them. But ERLE, Ch. J., nevertheless, intimates, in his opinion, that where the loss has resulted from gross negligence on the part of the lodging-house keeper, he will be liable.

Now, it seems to me that a distinction may be made as regards liability, between a boarding-house keeper and one

who merely lets lodgings. Assuming, however, that ERLE, J., is correct when he says, in *Dansey* agt. *Richardson* (*supra*), that the same reasoning will apply equally to each, I am of opinion, after much consideration, that the rule of law as laid down by the court in the last named case, is the better and more correct one. Nearly every objection which can be urged against charging a boarding-house keeper for the loss of his guest's goods will, upon reflection, be found to apply with equal force to an inn-keeper. Yet the latter is deemed an insurer of the property of his guest, and is bound to make good any loss, with some rare exceptions (*Hulett* agt. *Swift*, 33 *N. Y.*, 571). It may be said that because of this extraordinary liability the law to some extent recompenses him by giving him a lien upon the goods of his guest, by which he can enforce summary payment of his reasonable charges. But in this state a boarding-house keeper now has, by statute, all the rights and remedies in respect of the baggage and effects of his guest that an inn-keeper possesses (*Laws of* 1860, *chap.* 446; *Jones* agt. *Morrill*, 42 *Barb.*, 623).

In *Ingalsbee* agt. *Wood* (36 *Barb.*, 452), the court, speaking of the inn-keeper's lien, say: "The lien and liability must stand or fall together." The material question then is, shall the boarding-house keeper have the inn-keeper's lien without incurring any of his liability? Shall he possess all the inn-keeper's rights and advantages, without any corellative duty or obligation on his part? I apprehend not. When the boarding-house keeper receives a boarder into his house he also receives as incident to it his baggage and effects, and he ordinarily makes arrangements with reference thereto just as much as the inn-keeper does with respect to the goods of his guest. In both cases this is done for hire and reward; and it can make no difference that in the one case the compensation is included in the contract made with the boarding-house keeper, while in the other it is embraced within the reasonable charges which the inn-keeper is authorized to make.

Again, the boarding-house keeper usually has the custody and control of the property belonging to his boarders fully as much as the inn-keeper has the care and keeping of that belonging to his guests. The boarding-house keeper, moreover, may be said to have the advantage of the inn-keeper in that he may, at his option, refuse to take an applicant for board whose appearance or references may not be satisfactory, whereas, the inn-keeper is obliged to receive and entertain all who come unless he has a lawful excuse for refusing to do so. In view of all this, it is, as COLERIDGE, J., very properly remarks in *Dansey* agt. *Richardson*, difficult to see why, on principle merely, the boarding-house keeper should not be required to take at least as much care of the goods of a guest as the inn-keeper.

It is true the extreme liability of an inn-keeper is owing to a custom which had its origin in a peculiar state of society which does not exist at the present time. Nevertheless, judge PORTER, in delivering the opinion of the court of appeals, in *Hulett* agt. *Swift* (*supra*), says: "The considerations of public policy in which the rule had its origin forbid any relaxation of its rigor. * * * We are not at liberty to discard the settled rules of the common-law, founded on reasons which still operate in all their original force. * * * The rule is salutary and should be steadily and firmly upheld." I do not however by any means wish to be understood as favoring the idea that a boarding-house keeper should be held to the same degree of care in respect to the goods of his boarder that is exacted from an inn-keeper. All that I contend for is, that he should be required to exercise due and reasonable care; such care as a prudent person would ordinarily take of his own property. That care the court, in *Dansey* agt. *Richardson*, conceded he was bound to take; and that care, it seems to me, it is but fair and just to the boarder that he should take.

But we are not left wholly without authority on this point, so far as our own courts are concerned. In *Ingalsbee* agt. *Wood*

(*supra*), Mr. justice POTTER, in speaking of the responsibility of an inn-keeper to one who is not his guest but merely a lodger, says: "In such a case he is liable to his lodger for his goods, in law, *like any other bailee*, but not as an inn-keeper." The case of *Buddenberg* agt. *Buner* (1 *Hilt.*, 84), in this court, would also seem to be in point. It appears to have been an action between the assignee of a boarder and a boarding-house keeper, to recover for the loss of clothing stolen from the boarder's room. The reporter in his head-notes it is true assumes that the defendant was an inn-keeper, but the statement of facts goes to show that the relation of boarding-house keeper and boarder existed between the defendant and the plaintiff's assignor. Besides, it also appears that the latter was not a traveler but a workman. The district court rendered judgment in favor of the plaintiff, and this court on appeal affirmed the same, judge INGRAHAM delivering the opinion. It seems to me, therefore, that both upon principle and authority, a boarding-house keeper should be held to the exercise of ordinary and reasonable care in respect of his boarder's goods.

As regards the liability of a boarding-house keeper for the negligence of his servants, I agree in the views expressed in the opinion of chief-justice CAMPBELL and judge COLERIDGE, in the case of *Dansey* agt. *Richardson*. The general rule undoubtedly is, that a master is liable to third persons for the negligence of his servants while acting within the scope of their employment as such. I know of no good reason why a boarding-house keeper should be an exception to this rule. "*Qui facit per alium facit per se*" is a maxim which seems to me to be as applicable to him as to any other person. A boarder at a boarding-house, in general, has no more control of, or authority over the servants in the house than a guest at an inn has over the inn-keeper's servants. Mr. Redfield, in his valuable work on bailments (*page* 441, *note*), says that both in London and on the continent there are two kinds of boarding-houses; in the one class the house is virtually given

up to the boarders, the keeper himself being only a head servant over the other servants, and all of them in the service of the boarders; in the other class, the house, the servants and all the goods therein are in the possession and under the control of the keeper, who is responsible for the carefulness of the one and the safe keeping of the other. This readily accounts for the difference of opinion among the learned English judges on this question of holding the boarding-house keeper liable for the negligence of his servants. But the same author proceeds to say, that in the United States the latter class is almost the only one which exists to any great extent. And after commenting on the cases of *Dansey* agt. *Richardson* and *Holder* agt. *Goulby*, he expresses the opinion that in this country "the view of the law maintained by lord CAMPBELL, Ch. J., and COLERIDGE, J., is the one which is alone applicable." So also, Mr. Parsons, the learned author of the work on contracts (*vol.* 2, *page* 153, *5th ed.*), in contrasting the opinions of ERLE and WIGHTMAN, JJ., with those of CAMPBELL, Ch. J., and COLERIDGE, J., says: "We cannot but think this latter view more consistent with reason and with the authorities, so far as they bear upon the question."

It follows from what has been said, that the court below was authorized to find upon the evidence adduced in this case, that the loss of the plaintiff's goods was occasioned by the negligence of the defendant's servants, and was therefore correct in adjudging that the defendant was responsible for the damage resulting from the larceny. But the aggregate value of the goods stolen, as proved on the trial, does not exceed in amount ninety-three dollars. The court could not allow the plaintiff for the two or three small articles of jewelry when there was not a particle of evidence of their value. There should have been at least some proof of value to justify the awarding of more than mere nominal damages for them. The witness could not testify as to the value of those

articles, and I do not think that the court was warranted in simply guessing at or arbitrarily fixing their value.

The judgment should, therefore, be reduced to ninety-three dollars and affirmed for that amount, with costs and extra costs of the court below; neither party to have costs on appeal to this court.

DALY, Ch. J., and J. F. DALY, J., concurred.

SUPREME COURT.

WILLIAM H. PUGH, receiver, &c., agt. FRANCIS W. HURTT.

Foreign receivers — when may sue in the courts of this state — complaint.

Receivers and trustees appointed in other states may sue as such in the courts of this state.

The only ground on which our courts will refuse to receivers appointed by the courts of other states the privilege of suing here, seems to be where their claim comes in conflict with the rights of creditors in this state. Our courts will not sustain the lien of foreign assignees or receivers, in opposition to a lien created by attachment under our own laws, nor extend their courtesy so far as to work detriment to citizens of our own state, who have been induced to give credit to the foreign insolvent. In other cases comity demands that they should be allowed to sue.

Where a complaint alleges that the United States Proprietary Medicine Company was a joint stock company, duly incorporated under the provisions of a statute of the state of Ohio; that at the time mentioned in the complaint the company was and still is insolvent, stating the acts of insolvency; that the act under which the company was incorporated contains a provision that all stockholders shall be deemed and held liable to an amount equal to their stock subscribed, in addition to said stock, for the purpose of securing the creditors of said company; that the defendant was a stockholder owning shares of stock; also the due and proper appointment of the plaintiff as receiver in an action in the courts of Ohio; and an order made whereby he was directed to proceed at once to collect by suit the statutory liabilities of stockholders residing without the jurisdiction of said court by bringing suit against them in the proper courts of the states in which they reside: *held*, to be a complete statement of the cause of action.

Special Term, November, 1875.

DEMURRER to the complaint, on the ground that the same does not state facts sufficient to constitute a cause of action, and that the plaintiff has not legal capacity to sue.

Mr. Burnett, for defendant.

Mr. Foster, for plaintiff.

LAWRENCE, *J.*—If the plaintiff is entitled to sue in the courts of this state, I cannot see why the complaint can be said not to state facts sufficient to constitute a cause of action. The allegations of the complaint are that the United States Proprietary Medicine Company was a joint stock company, duly incorporated under the provisions of a statute of the state of Ohio; that at the time mentioned in the complaint the said company was and still is insolvent, its debts amounting to over $100,000, which remain unpaid, and that the company has no assets.

That the act under which the said company was incorporated contains a provision that all stockholders of any joint stock company thereunder organized shall be deemed and held liable to an amount equal to their stock subscribed in addition to said stock for the purpose of securing the creditors of said company.

That the defendant, for four years prior to the times mentioned in the complaint, was a stockholder owning shares amounting, at par, to $5,900 in value.

It is then averred that in November, 1871, in a suit brought in the superior court of Cincinnati, in said state, against the company and certain of its stockholders, which suit was brought by a judgment creditor of the company on behalf of, or for the benefit of, all the creditors; the plaintiff herein was appointed a receiver, &c., and that by an order made in said action the plaintiff was directed to proceed at once to collect, by suit, the statutory liabilities of stockholders residing without the jurisdiction of said court by bringing suit against them in the proper court of the states in which they reside.

The statement of the cause of action is complete on the face of the complaint, and the whole case turns, in my

opinion, upon the question whether the plaintiff has legal capacity to sue in the courts of this state.

The defendant relies upon the doctrine that the laws of a State have no extra territorial force, and while his counsel concedes that, by the comity of the different states, foreign receivers and trustees may sometimes be permitted to sue in the courts of this state, it is contended by him that the cases wherein such comity is extended are cases of common law rights and liabilities, and that it does not extend to actions to enforce statutory penalties or liabilities imposed by the legislature of a sister state.

Having gone over the numerous cases relied on by the counsel, I have been able to find but one case which appears to fully sustain his position, and that is the case of *Winter* agt. *Baker* (50 *Barb.*, 432), which was decided by Mr. justice CLERKE, at a special term of this court, in which that learned justice holds that, "although in this state liabilities imposed on stockholders by the act of incorporation or by a general statute have been regarded by our courts in the nature of contracts, it does not follow that all liabilities created by the legislature of another state can be enforced here." And he comes to the conclusion that a complaint was bad on demurrer which alleged that "the defendant is a stockholder in the said Mechanics' Bank, and that, under and by virtue of a law or laws of the said state of Georgia, the said defendant is liable without averring that such a law was in force at the time the debt was contracted, and without showing that the liability was founded on a contract and not a special statutory provision in the nature of a penalty." I am unable to regard this decision as controlling upon me in this case, for the reason that here the provision of the Ohio statute is set out in full, and it is a provision which, in construing similar statutes in this state, our courts have held to be in the nature of a contract, as justice CLERKE, in his opinion, concedes.

The provision, in my opinion, is not in the nature of a penalty, but a part of the liability which the defendant, as a

stockholder, agreed to assume at the time he became such stockholder.

Nor can I distinguish this case from *Ex parte Van Riper* (20 *Wend.*, 614), which is commented upon in the opinion in *Winter* agt. *Baker*.

The liability of the defendant here, under the Ohio statute, is just as positive as the liability of Van Riper under the statute of New Jersey, which was the subject of consideration in Van Riper's case (*see, also, Perkins* agt. *Church*, 31 *Barb.*, 84).

The true rule applicable to this case was stated by judge CLERKE, in the case of *Runk* agt. *St. John* (29 *Barb.*, 587). That was an action brought by Runk and others, as receivers, against St. John and others, to set aside a conveyance as fraudulent and void against the insolvent company of which the plaintiffs were receivers, and as against the creditors of said company.

Judge CLERKE, in his opinion, says: "The defendants' counsel denies the capacity of receivers appointed in other states and countries to sue in courts of this state. The law and proceedings of other sovereignties have not, indeed, such absolute and inherent vigor as to be efficacious here under all circumstances: But in most instances they are recognized by the courtesy of the courts of this state, and the right of foreign assignees or receivers to collect, sue for and recover the property of the individuals or corporations they represent has never been denied, except where their claim came in conflict with the rights of creditors in this state. All that has been settled by the decisions to which we have been referred on this subject, is that our courts will not sustain the lien of foreign assignees or receivers in opposition to a lien created by attachment under our own laws. In other words, we decline to extend our wonted courtesy so far as to work detriment to citizens of our own states who have been induced to give credit to the foreign insolvent."

He then goes on to say that the case at bar, not being "a

contract between foreign creditors and domestic attaching creditors," the objection taken by counsel cannot be sustained. This seems to me to be the true and only ground on which our courts have refused and should refuse to receivers appointed by the courts of other states of the union the privilege of suing here. In other cases comity demands that they should be allowed to sue. No detriment can be said, within the meaning of the case just cited, and within the meaning of the decision on which that case was decided, to result to the defendant as a citizen of this state. The plaintiff is not contending with the defendant as a creditor of the insolvent company. He is seeking to enforce the liability of the defendant as a stockholder of that company, which liability was voluntarily incurred by the defendant when he became such stockholder. In short, the plaintiff asks the intervention of this court to enable him to compel one of the citizens of this state to carry out and perform an obligation into which, of his own free will, he entered when he became a stockholder of a company organized under the laws of the state of Ohio. Instead of turning the plaintiff out of court, justice requires that comity should be invoked in his favor, and that he should be aided and assisted by this court in enforcing the defendant's liability.

The other criticisms made by the defendant's counsel, upon the complaint, would be more properly the subject of consideration on a motion to make the complaint more definite and certain.

There should be judgment for the plaintiff on the demurrer, with leave to the defendant to answer on payment of costs within ten days.

NEW YORK COURT OF APPEALS.

Louis Haas, assignee in bankruptcy, &c., respondent, agt. Thomas O'Brien, appellant.

The making of a general assignment, without preferences, under the state law does not, *per se*, contravene any provision of the bankruptcy act. That act was aimed at fraud and preference, and where neither of these are apparent there is no ground for claiming that an equitable distribution of the insolvent's estate is in violation of law.

Appeal from an order of the general term of the superior court of the city of New York, affirming a judgment entered upon the report of David McAdam, Esq., referee, in and by which he found the following facts:

First. That on the 18th day of May, 1872, Patrick Flanagan was adjudicated a bankrupt at the city of New York, in the district court of the United States for the southern district of New York, and that on the 12th day of July, 1872, the plaintiff was duly elected assignee of said bankrupt pursuant to the provisions of the United States bankrupt act.

Second. That prior to such bankruptcy proceedings, to wit, on the 9th day of January, A. D. 1872, the defendant being then embarrassed and unable to pay his debts, and being bankrupt within the meaning of the bankruptcy act, did make a general assignment, under the laws of the state of New York, to the defendant, of his assets, consisting of a stock of merchandise, for the benefit of his creditors, and that said assignment was drawn and perfected in all things in strict compliance with the laws of the state of New York.

Third. That under said assignment the defendant, as assignee, sold the assigned property and realized $2,254.17

therefor at an auction sale thereof, which sum was the fair market value thereof.

Fourth. That out of said moneys the assignee paid sixty dollars for January rent of the assignor's store and premises and fifty dollars for inventorying the assigned property, which I find were proper and necessary for the benefit of the estate of said assignor.

Fifth. The expenses connected with drawing the assignment and preparing and filing the necessary bonds and inventories amounted to $205 (ten dollars being disbursements and $195 attorneys' fees), which I find are not chargeable against said assigned estate as against the assignee in bankruptcy.

Sixth. That demand was made on said defendant for said proceeds of sale, which the defendant refused to give up.

Seventh. That the said assignee and attorney, as well as the said assignor, knew that he, the said assignor, was a bankrupt, within the meaning of said bankruptcy act, at the time when the said assignment was drawn and the services rendered thereunder.

And, as conclusions of law, the referee decided:

First. That the assignment to the defendant was and is void under the said bankruptcy act, and that it did tend to evade the provisions of said act and to prevent the assignor's property from being distributed under said act.

Second. That the items of sixty dollars and fifty dollars paid by the defendant, and before referred to (being charges incurred for the benefit of said assigned estate), were charges thereon which should be allowed to the said defendant.

Third. That the charges for attorneys' fees and disbursements are not allowable, and are disallowed.

Fourth. That the defendant is not entitled to any compensation for services under said assignment.

Fifth. That the said defendant is liable to the plaintiff for the moneys received by him, said defendant, at said sale, to wit, $2,254.17, less said sum of $110 aforesaid, to wit, for the

sum of $2,144.17, for which amount I hereby order judgment against the said defendant, together with costs.

From the order of the general term affirming a judgment upon this report the defendant appealed.

Samuel Hand and Jacobs & Koch, for respondent.

Jacob A. Gross, for appellant.

MILLER, *J.* — The assignment made by Flanagan to the defendant was in trust to pay all the creditors of the assignor equally and alike, and without any preference; and it was admitted upon the trial that Flanagan, being insolvent, made and executed the assignment in good faith, and to insure, under and by virtue thereof, the distribution of all his property among his creditors without preference. It was also proved that it was made without any intention to delay, hinder or defraud creditors, or to defeat the object of the bankrupt act. The provisions with which it is claimed that the assignment was in conflict, and which rendered it void, declared that "if any person, being insolvent or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, make any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property, to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance, is made with a view to prevent his property from coming to the assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt; and if such sale, assign-

ment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the act shall be *prima facie* evidence of fraud" (*See section* 35, *Bankrupt Law; also the last two clauses, section* 39, *Bankrupt Law, before the amendment of June*, 1874).

Although the referee found that the assignment was void under the bankrupt act, and that it did tend to evade the provisions of the same, and prevent the assignor's property from being distributed, there is no distinct finding that the assignment was made in direct contravention of the provisions cited, and the fact that it was done in good faith, and without any intention to violate or defeat the provisions of the act, as already stated, rebuts any presumption arising under the act that it was *prima facie* fraudulent. The conclusion of the referee referred to, therefore, rests upon the simple fact that the assignment was made, if at all, within six months prior to the filing of a petition in bankruptcy, under the act, in contemplation of insolvency by the bankrupt, and with the knowledge of the defendant, or reasonable cause to believe at the time that Flanagan was insolvent.

The real question to be determined, then, is, whether an act of this kind, made in good faith, and with no fraudulent intent, for the benefit of creditors, is in violation of the spirit and intention of the bankruptcy act, and for that reason fraudulent and void. The provisions cited evidently contemplated not only that the assignor should commit the act when insolvent, or in contemplation of insolvency, but that the assignee should have reasonable ground to believe that such was the case, and that the assignment was made with a view of preventing the property from being disposed of under the bankrupt act, and as therein provided. As there is no finding of fact that the intent was to evade any of the provisions of the act, and as the proof and admissions show good faith, the conclusion that the assignment was void, and did tend to evade the provisions of the act, does not appear to be warranted.

The object and purpose of the act in question was to provide a system by which the property of an insolvent could be appropriated and applied to the payment of his debts, in equal and just proportions. The theory upon which the bankrupt act was based is, that no preference shall be allowed, that every creditor shall be entitled to his *pro rata* share of the bankrupt's estate, and thus fraud prevented in the distribution of his assets. When, therefore, an assignment is made for the benefit of all his creditors equally, in good faith, without fraud or any intent found to contravene any provisions of the law, or to hinder, delay or defraud creditors, it is not apparent how such assignment can be considered as a violation of the spirit and intention of the act itself. In *Tiffany* agt. *Lucas* (15 *Wallace U. S. S. C. R.*, 410, 412), it was held that two things must concur to bring an assignment within the jurisdiction of the bankrupt act, viz., the fraudulent design of the bankrupt and the knowledge of it on the part of the assignee. Neither of these features characterize the case at bar. The admission and proof establish that there was no such design or knowledge. In fact, that all the parties acted in entire good faith, and with no intent to violate the provisions of the act. The principle is settled in this court that when the debtor has not been proceeded against, or taken any proceedings in the bankrupt court, an assignment for the benefit of creditors by an insolvent debtor, which gives no preference to any creditor, is not an instrument void *per se* as in hostility to the bankrupt act (*Thrasher* agt. *Bentley*, 59 *N. Y.*, 649; *see, also, Cook* agt. *Rogers*, 31 *Mich.*, 391; *Beck* agt. *Parker*, 65 *Penn.*, 462; *Hawkins' Appeal*, 34 *Conn.*, 548). The fact that proceedings were instituted within the six months provided for by the section cited does not change the application of the rule referred to, unless there is a fraudulent design and knowledge. In *Sedgwick* agt. *Place* (1 *N. B. R.*, 204, 673), it was held, in the United States circuit court of New York, by Mr. justice NELSON, that a general assignment, untainted with

fraud, as against creditors or the bankrupt act, is valid, and the property will not be turned over to the assignee in bankruptcy. An application in this case was made for the benefit of the bankrupt act within six months after the assignment had been made. In *Langley* agt. *Perry* (2 *Nat. B. Reg.*, 597), in the United States circuit court of Ohio, where the petition was filed against the debtor within six months, SWAYNE, J., held that such an assignment was not necessarily a conveyance with an intent to hinder, delay or defraud creditors, and where the intention was to secure an equal distribution of all the debtor's property among all his creditors, it was not a conveyance with an intent to defraud or delay the operation of the bankrupt act. It was said that the innocence or guilt of the act depended upon the mind of him who did it, and it was not a fraud within the meaning of the bankrupt act unless it was meant to be so.

In *Mayer* agt. *Hillman* (*U. S. Sup. Ct., reported in* 13 *Alb. Law J.*, 200), the general doctrine was upheld that a general assignment for the benefit of creditors was not fraudulent nor absolutely void. FIELD, J., who delivered the opinion of the court, said there was much force in the position of counsel that such assignment is only a voluntary execution of what the bankrupt court can compel, and as it is not a proceeding in itself fraudulent as to creditors, and does not give a preference to one creditor over another, it conflicts with no positive inhibition of the statute, and that it had the support of the decisions last above cited. He further stated that it was unnecessary to express any decided opinion upon the question, because its decision was not required for the disposition of the case. Although the point now presented was not distinctly decided in the case last cited, yet that case in connection with the other cases referred to tend strongly to sustain the doctrine that a general assignment violates no provision of the bankrupt act (*see, also, Smith* agt. *Victoria Ins. Co.*, 72 *Nat. B. R.*, 185; *Smith* agt. *Victoria Ins. Co.*, 4 *N. B. R.*, 130; *In re Kintzing*, 3 *N. B. R.*). There are

authorities adverse to the cases cited. Most of them are the decisions of the United States district court, which are not as authoritative as the cases already cited, and the distinct point now raised was not made, nor does it appear distinctly in all of them, as in the case here, that any of the assignments were made in good faith and with no design to evade the provisions of the bankrupt act (*Foster* agt. *Harkly*, 2 *N. B. R.*, 406; *In re Smith*, 3 *id.*, 377; *In re Goldschmidt*, 3 *id.*, 164; *In re Spencer* agt. *Ward*, 3 *id.*, 519; *In re Randall* agt. *Sutherland*, 3 *B. R.*, 18; *Prince* agt. *Northrup*, *id.*, 250; *In re Wells*, 1 *id.*, 171; *In re Reid*, 1 *Dillon*, 439; *Hardy* agt. *Bruminger*, 4 *N. B. R.*, 262). In the last case WOODRUFF, J., makes some remarks in regard to the design of the bankrupt act in reference to the property of insolvents, and the effect of some of its provisions which would not apply when the property was in the hands of a receiver appointed by a state court, but the point now raised was not presented, and the case is not analogous. Although some of these cases appear to sanction the doctrine that the bankrupt act absorbs and swallows up all other proceedings in the state courts, yet there are the strongest reasons for holding that the act was not intended to interfere with the debtor, when with an honest purpose and entire good faith he sought to apply his property for the benefit of his creditors, precisely in the same manner as was intended and as would have been done by proceedings under the bankrupt act, and probably at less expense, and far more to the advantage of the creditors. The act was aimed at fraud and preference, and where neither of these are apparent there is no ground for claiming that an equitable distribution of the insolvent's estate is in violation of the law. The latter case to which reference has been made upholds these views very decidedly, and I think should be followed. The court below erred in holding that the assignment was void and tended to evade the provisions of the bankruptcy act, and for this error, without considering the other ques-

tions raised, the judgment must be reversed and a new trial granted, with costs to abide the event.

All concur.

NOTE. — The United States circuit court for the northern district of Ohio, in the case of *The Globe Ins. Co.* agt. *The Cleveland Ins. Co.* (*decided April 7, 1876, and recently reported in the National Bankruptcy Register Reps., vol. 14, p. 311*), in an exhaustive opinion by EMMONS, J., reviewing the English and American authorities upon the subject, *held*, that a general assignment for the equal benefit of all creditors is void as against an assignee in bankruptcy, being at war with the policy of the bankrupt law; that the same rule was applicable to the law of 1841; that such has always been the rule under each successive English act, and is now a matter of statutory provision in England; that the rule, that where a statute is taken from another country or state which has received a judicial interpretation, the presumption will be that such interpretation is also adopted, held to be applicable, in this instance, with more than ordinary force; that in the laws of 1867 the judicial interpretation which in England held general assignments to be void, as against a claimant, under the bankruptcy law, has been expressly adopted by adding the words, "or to defeat the operation of the act." It was this effect in England which the courts declared avoided such transfers. The importance of the question decided makes this conflict of authority between the state and United States court of sufficient interest to the profession to be noted.— [REP.

SUPREME COURT.

Anthony agt. Day.

Account stated and settled — fraud and misrepresentation therein — rescission of contract — parties.

A settlement of an account between parties, involving the receipt and disbursements of moneys, will not preclude a party to the settlement from afterwards preferring a claim for overcharges and misrepresentations, with respect to the subject-matter settled, if afterwards discovered.

Before a party can demand a rescission of a contract he must restore, promptly and completely, or offer to do so, what he has received under it, unless such restoration has been rendered impossible by the act of the party charged with the fraud.

The persons necessary to be made parties to such an action, considered.

Special Term, October, 1875.

Demurrer to complaint.

Van Vorst, *J.* — Conceding that there was a full settlement of the stock and land transactions between defendant and plaintiff's husband, in July, 1864, and that there were only two matters not embraced therein, it does not follow that the claims of the defendant for overcharges and misrepresentations of the plaintiff's husband, with respect to the stocks, were embraced therein. The settlement appears to have embraced the account of moneys of the defendant invested by the plaintiff's husband in property and stocks, and the distribution of profits upon the statement rendered by him.

If the defendant subsequently discovered any overcharge

or misrepresentation in the account or statements of the plaintiff's husband, he might properly prefer a claim therefor, notwithstanding the adjustment and settlement.

By a postscript to the defendant's letter of January 4, 1875, it would appear that his claims arose from such causes. He says: "Since writing the above I have looked over my papers to find the claims I made against Mr. Anthony in 1867. I find the claims, a copy of which I think I then gave you, arose out of overcharges and misrepresentations in relation to the following stocks." He then gives a list of the stocks, which appear to be the same with respect to which the plaintiff's husband had made the disbursements for himself and defendant, anterior to the settlement of 1864.

Notwithstanding the settlement the defendant would not be precluded from preferring claims arising out of the causes indicated, if afterwards discovered.

And such subsequently discovered claims, if preferred in good faith, would constitute a proper subject of adjustment and compromise, and would furnish a good consideration for the conveyance in question.

Prominently in his complaint the plaintiff interposes the settlement of July, 1864, as a ground for his assertion that the defendant's claims againt her husband are invalid. I would have little hesitation in saying that the facts alleged in this behalf exhibit a case in which the plaintiff would be entitled to relief in a court of equity were it not for the implication arising from the postscript to the defendant's letter of January 4, 1875, that the assigned claims arose, or were discovered subsequent to the settlement of July 2, 1864, out of overcharges and misrepresentations as to the cost of stocks and property, the subject of which was not then discussed or settled.

And I would say, that when the transactions and statements of parties are under review, even when set forth in pleadings in an action, a construction favorable to innocence and good faith, when the facts reasonably justify such conclu-

sion, is to be preferred to that which would impute fraud and deceit.

But I do not think it absolutely necessary to pass upon the goodness of the complaint in this regard as, in my opinion, it is wanting in other statements necessary to constitute a cause of action. If well taken the other objection is fatal to the pleading.

The complaint asks, in substance, for a rescission of the contract between plaintiff and defendant by which the lands in question were by her conveyed to him, and for a reconveyance to her of the lands upon the alleged ground of a failure of consideration and the fraud and deceit of the defendant.

The fraud and deceit consisting in false representations alleged to have been made by the defendant in regard to the claims which were assigned by him to her son as a consideration for the conveyance of the lands, yet no reassignment of the claims is offered or tendered in the complaint, nor is any alleged to have been tendered before suit brought.

The assignee of these claims is the plaintiff's son, who is not even a party to the suit. I do not think the allegations in the complaint, that the claims are invalid, obviate the necessity of an offer or tender to reassign. No efforts have been made to enforce the claims. One claim at least, covered by the assignment, that growing out of the Granite Company stock, is confessedly valid. This claim, with interest, amounts to some $7,000. I do not think that the plaintiff can offset the 1,666 acres of land in Michigan against this claim. The trust in respect to these lands was in favor of *her husband.*

And in the defendant's proposal made to the father, through the son, contained in his letter of March 12th, 1866, to take these lands towards the payment of this particular claim, he expressed his willingness to do so, only at a certain rate, and he claimed that the balance should be paid him in money. This was not acceded to or done. As the release contemplated at the time of the assignment of the claims has

never been executed and delivered, it may well be urged that the trust in these lands still continues in favor of the heirs of the plaintiff's husband. The trust will, in any event, be in full force if the assignment of the claims be adjudged fraudulent and void. Before a party can demand a rescission of a contract, he must restore what he has received. This must be done promptly and completely. In *Cobb* agt. *Hatfield* (46 *N. Y.*, 533), it is stated that in order to rescind a contract, on the ground of fraud, there must not only be a disaffirmance of it at the earliest practicable moment after the discovery, but a return of all that has been received under it, and a restoration of the other party to the condition in which he stood before the contract was made. This is equitable.

The rule has been modified in cases when a return has been rendered impossible by the act of the party charged with the fraud.

But in this case there is no such difficulty. The assignment was, indeed, made to her son, but this was done at the plaintiff's request, and in her interest. The assignment is general, but it transfers all the defendant's claims against the husband of the plaintiff. The legal title to the claims has passed from the defendant by virtue of the assignment, and he can only be put in *statu quo* by a reassignment. This has been neither made nor tendered.

The rule is different when the action is at law for damages.

In an action to recover damages for a deceit it is not necessary to rescind the contract (*Ely* agt. *Mumford*, 47 *Barb.*, 632).

There are some seeming exceptions to the rule, as above stated, that the return of what had been received under the contract should be made or tendered before suit brought, but if examined closely, these cases will not be found to conflict with this necessity, or with the reasonableness of the requisition.. As when goods are fraudulently obtained on credit, for which the vendee's worthless note has been received, the vendor may maintain an action to rescind the contract, with-

out a previous return of the note. It is sufficient to produce it on the trial (*Nichols* agt. *Michael*, 23 *N. Y.*, 264). The reason for the decision being that if the fraud is made out, and the contract subverted, the vendee's notes are void and will be canceled by the court.

It would be otherwise, clearly, if the notes of a third person had been received (*Baker* agt. *Robbins*, 2 *Denio*, 136).

A tender before suit was held not to be necessary when the property delivered to the defrauded party was, in itself, wholly worthless (*Stone* agt. *Frost*, 6 *Lansing*, 440).

In *Harris* agt. *Equitable Life Ass. Society* (3 *Hun*, 724), Davis, P. J., says, the party seeking relief "must return, or offer to return, to the other party before commencing his action, whatever he has received under the contract, unless it be of such a character that its return at the trial, or in the progress of the suit, will leave such party in as good condition as the return or offer before suit would have done."

In *Allerton* agt. *Allerton* (50 *N. Y.*, 670), it was held the fraud being established, that no tender of the amount received was necessary before suit brought, as the judgment sought for and given allowed it to the defendant, and there was an actual return of the consideration paid.

But the case under consideration does not come within the ruling of either of the cases above mentioned. The assignment under examination was valid as a transfer, and passed to the assignee at least one good claim. The assignment was not to the plaintiff, so that she might bring it into court on the trial to be canceled, but to a third party, the plaintiff's son, who is not a party to the action. The judgment, even if in the plaintiff's favor in the end, could not absolutely secure a reassignment, as the legal title to the claims was in a person who could not be concluded or bound by the judgment, as he had been in no position to be heard in respect to the litigation.

And this conclusion suggests another ground of demurrer, which appears to be well taken.

It is objected on the part of the defendant, that there is a defect of parties, and that James L. Anthony and Phebe L. Day, wife of the defendant, are proper parties. I should say that they are proper, and in fact, necessary parties.

In the event that a reassignment of the claims shall be adjudged, the judgment could not be enforced against James L. Anthony, the assignee, without his presence as a party. The plaintiff asks a reconveyance of the lands by deed to be executed by the defendant and his wife. The wife of the defendant has an interest in the lands. In respect to that she is entitled to be heard. No judgment as to her could be enforced without her presence as a party to the action. As to the above grounds the demurrer of the defendant is well taken, and there should be judgment for the defendant accordingly, with leave to the plaintiff to amend on the usual terms.

The other grounds of demurrer upon the facts stated in the complaint, I do not think are well taken.

SUPREME COURT.

JOHN LAFOND *et al.* agt. HENRY W. DEEMS *et al.*

Mutual benefit associations — dissensions among members — dissolution of — receiver.

Companies or societies which are not sanctioned expressly by the legislature, pursuant to some special or general law, are nothing more than ordinary partnerships, and the laws respecting them are the same.

While a partnership or association will not ordinarily be dissolved for mere defects of temper in some of the members of the copartnership, the evidence of violent and lasting dissensions is a ground upon which a court of equity will decree a dissolution. So, too, when the whole scheme is found to be visionary or founded upon erroneous principles.

In such a case a receiver will be appointed for an adjustment of the accounts of the copartnership or association, and a decree of dissolution will be made.

Special Term, June, 1876.

THE parties in this suit, some forty in number, were members of a mutual benefit association or copartnership which was organized in 1842, under the name of "Washington Tent No. 1, Independent Order of Rechabites," the objects of which were "mutual benefit in the exercise of temperance, fortitude and justice, securing to its membership sympathy and relief in times of sickness and distress, and in the event of death the decent observance of the necessary funeral obsequies; and is based upon and seeks the extension of the principles of total abstinence from all intoxicating drinks." In the course of time the association accumulated about $5,000, which was deposited in different banks in the city of New York, and which, according to the allegations of the plaintiff and of some of the defendants, belonged to and

was the property of all the members equally. The plaintiffs, three in number, were regularly elected trustees, and as such claimed the care and custody of the funds and the property of the association. In September, 1875, Patricius M. Stackpole, one of the defendants, who claimed to be the chief ruler, served a notice on the various banks, warning them not to pay out any of the money except by order of the tent. This and a conspiracy which the plaintiffs allege was formed by the said Stackpole and other defendants to deprive various members of the association of their rights and to gain possession of the funds, gave rise to discords and dissensions among the members. They, therefore, prayed for a dissolution of the association, the appointment of a receiver, and for an equal distribution of the funds among the members.

Eleven of the defendants, by their answer, alleged that the money in question had not been earned by the association in the regular course of collection of dues and fines, but by the transaction of outside business entirely distinct from the objects of the association and the motives of its founders, and in the transaction of such business a feeling of bitter hostility had grown up among the members. They also prayed for affirmative relief that the association be dissolved, the funds equally divided, and they be allowed to organize themselves under such name and rules as they might see fit. Twenty-six of the defendants, by their answer, denied the copartnership, and alleged that the fund was a trust fund for the benefit of the order. They admitted the election of the plaintiffs as trustees, but that they had subsequently been dismissed by a majority vote at a regular meeting of the association; that the funds, according to the constitution and by-laws, were lodged equally with the chief ruler and recording secretary, and that if the trustees thought themselves aggrieved by their dismissal they should have appealed either to the tent, to the high chief ruler of the high tent, or the high tent itself, as provided for in the by-laws. The case occupied four days in being tried, and the testimony revealed a queer state of

affairs in an organization formed for such a laudable purpose. The meetings were very turbulent and boisterous, and all gentlemanly instincts were forgotten, while parliamentary rules were utterly disregarded.

Ex-judge Walter S. Cowles and *Henry C. Banks*, for the plaintiffs, and *Geo. F. and J. C. Julius Langbein*, for the eleven defendants, made and argued the following points:

I. Washington Tent No. 1, Independent Order of Rechabites, is a voluntary association not sanctioned expressly by the legislature, pursuant to some general or special law; is no more than an ordinary partnership, and as such is subject to the supervision of a court of equity (*Austin* agt. *Learing*, 16 *N. Y.*, 112; *Collyer on Partnership*, §§ 25, 53, 553, 624, 626, 627; *Gow on Partnership, part* 2, 227; *Wells* agt. *Gates*, 18 *Barb.*, 554; *Dennis* agt. *Kennedy*, 19 *id.*, 517).

II. The law is the same with regard to joint stock associations (*Alsen* agt. *Sewell*, 2 *Wend.*, 327; *Moss* agt. *Oakley*, 2 *Hill*, 265; *Bailey* agt. *Bancker*, 2 *Hill*, 188; *Huger* agt. *McCollough*, 2 *Denio*, 119; *Same case*, 1 *N. Y.*, 47; *Townsend* agt. *Gowery*, 19 *Wend.*, 424; *Cross* agt. *Quackow*, 5 *Hill*, 478; *Campion* agt. *McNair*, 1 *Wend.*, 457; *Chase* agt. *Barrett*, 4 *Paige*, 148). Opinion of lord chancellor ST. LEONARDS in the case of *St. James Club* (an ordinary club), reported in 13 *Eng. Law and Eq.*, 592, holds the same doctrine.

III. Voluntary clubs or associations have always been regarded as and dealt with in courts of equity as partnerships (*Greenwood's Case*, 23 *Eng. Law and Eq.*, 422; *Richardson* agt. *Hastings*, 29 *Eng. Ch.*, 323; *Beaumont* agt. *Meridith*, 3 *Vesey & Bem.*, 180; *Gorman* agt. *Russell*, 14 *Cal.*, 531; *Lloyd* agt. *Larins*, 6 *Vesey*, 773; *Cockburn* agt. *Thompson*, 6 *Vesey*, 322; *Pierce* agt. *Piper*, 17 *Vesey*, 8; *Raab* agt. *Reade*, 5 *Rawl.*, 151).

Messrs. Stewart and Townley, for the twenty-six defendants, made and argued the following points:

I. "Washington Tent, No. 1, Independent Order of Rechabites," is a voluntary unincorporated association, and as such, is bound by its rules, when not in conflict with the law of the land; and the courts can interfere no further than to hold the association to a fair and honest administration of those rules. It is not a copartnership within the operation of the equitable remedies afforded by the courts for the protection of the rights of partners, as between themselves (*White* agt. *Brownell*, 2 *Daly*, 329).

LAWRENCE, *J.* — The claim made by the defendant's counsel, that the plaintiffs have an appropriate remedy under the constitution and by-laws of the Tent, for the wrong which they allege they have suffered, cannot, I think, be maintained. I am convinced, from the testimony, that exhibit B contains the constitution and general laws of the High Tent, and that Washington Tent, No. 1, when instituted, recognized the superior authority of the High Tent; and I do not find that the evidence sufficiently preponderates in favor of the plaintiffs to warrant me in holding that the constitution and general laws, have for many years been regarded by the Washington Tent as of no binding force. There are various provisions in the by-laws which are admitted by all parties to be valid and existing, which clearly recognize the superior body, known as the High Tent. The fifth section of article 11 of the by-laws evidently contemplates the right of an expelled or suspended member to appeal from the decision of Washington Tent. The fourth section of the third article of general laws provides for an appeal from the Primary Tent to the high chief ruler, and for a further appeal from his decision to the High Tent (*See also, section* 5 *of article* 5 *of the constitution as to the appellate jurisdiction of the high chief ruler*). No one, I think, can doubt that this is the appeal which is referred to in the fifth section of the eleventh article of the by-laws. Again, by the sixth article of the by-laws it is provided, "that the officers of this tent shall be such as

are prescribed in article 6, section 2 of the constitution, and shall be elected for a term of six months."

Upon turning to exhibit B, introduced in evidence by the defendants, it will be found that section 2 of article 6 prescribes the names of the officers of the various tents which may be organized under the constitution.

It appears, however, that there has been no meeting of the High Tent since 1860; and there is no evidence showing that any such meeting is likely to be held in future; nor does it appear that there is at present such an officer in existence as the high chief ruler, to whom the notice of appeal, provided for by the by-laws and general laws just adverted to, could be given. Granting then, that if the High Tent could be convened or the high chief ruler could be appealed to, the plaintiffs might be protected by appeal, it is quite apparent that there is no way at present open to the plaintiffs by which such appeal can be taken, or made effectual.

Again, the appeal just mentioned seems to be limited to cases in which a member complains of unjust expulsion or suspension, and does not embrace such grievances as those of which the plaintiffs complain in this action.

The complaint is framed upon the theory that the members of the Washington Tent, No. 1, are partners as to the assets and property of the Tent, and particularly as to the fund therein mentioned; that a conspiracy has been formed between the defendant Stackpole, the chief ruler, and the defendants represented in this action by Messrs. Stewart & Townly, with the design of unlawfully getting possession of the funds mentioned in the complaint, and of converting the same to their own use. The evidence reveals a state of feeling among the members which is much to be deplored.

The association was formed in 1842, for the purpose, as the second article of the constitution declares, of "mutual benefit in the exercise of *temperance*, *fortitude*, and *justice*, securing to its membership sympathy and relief in times of sickness and distress, and, in the event of death, the decent

observance of the necessary funeral obsequies; and is based upon and seeks the extension of the principles of total abstinence from all intoxicating drinks." The members seem to me to have departed very much from the objects of the association, except in respect to abstinence from the use of intoxicating drinks. No ordinary partnership or commercial venture could reasonably be expected to succeed when the persons engaged in it entertain such feelings towards each other as have been exhibited by the members of this association, and I am satisfied that the usefulness of the association has departed.

The evidence establishes that, in the years 1844, 1845 and 1846, as many as 300 or 400 persons attended the meetings of the association, now the whole membership has dwindled down to thirty-nine; with an average attendance of from twelve to twenty-five members at each meeting. A careful perusal of the testimony obliges me to conclude that each of the factions into which the association is divided has been guilty of conduct which cannot meet with the approval of the court.

I can find no justification for the trustees (the plaintiffs) in refusing to produce their books when they were called for by the tent; nor do I see what objection there was to the trustees attending the meetings of the Tent subsequent to the passage of the resolution of October 19, 1875, by which the Tent resolved itself into a committee of the whole on the books. The plaintiffs were present at that meeting, and the resolution seems to have been unanimously passed. It would appear that if a spirit of conciliation had been encouraged after the passage of that resolution, all the difficulties of the association might have been amicably arranged. On the other hand, the defendants, who are alleged to have been in collusion with the chief ruler, seem to have been unnecessarily harsh in their conduct and expressions toward those who sympathized with the trustees and their faction.

The fact of any conspiracy to divert the fund, or to appropriate it to their own use, is explicitly denied by the defend-

ants in their answer and in their evidence, and I do not find that it has been established.

The action of Stackpole, in notifying the savings banks not to pay moneys on the orders of the trustees, seems to have been based upon statements made, that the trustees could and would draw the moneys from the banks at their pleasure.

If this case, therefore, rested wholly upon the allegation of a conspiracy on the part of the defendants, represented by Messrs. Stewart and Townley, to deprive the minority of their rights under the constitution and by-laws, I should feel constrained to dismiss the complaint; but, in another point of view, it appears to me that the plaintiffs have made out such a case as requires a court of equity to intervene. In my opinion, the plaintiffs are right in their position that, as respects the fund now in possession of the Tent, the members of the association are to be regarded as partners.

In *Wells* agt. *Gates* (18 *Barb.*, 557), CLERKE, J., delivering the opinion of the court, says: "Companies or societies which are not sanctioned expressly by the legislature, pursuant to some special or general law, are nothing more than ordinary partnerships, and the laws respecting them are the same" (*see, also, Dennis* agt. *Kennedy*, 19 *Barb.*, 526; *Beaumont* agt. *Meredith*, 3 *Vesey & B.*, 180; *Collyer on Partnership, sec.* 53).

It appears, from the testimony, that the fund now in the hands of the association is mainly derived from the rental of rooms, and that the dues do not amount to enough or more than enough to pay the annual running expenses.

The renting of rooms was certainly no part of the object or purpose of the association, and in entering upon that business the association departed from the design of its founders.

If it be true that as to this fund the members of the association are partners, I think that, in accordance with the principles of several adjudications, the court should decree a dissolution of the partnership and distribution of the fund.

While a partnership will not ordinarily be dissolved for mere defect of temper in some of the members of the copartnership, the existence of violent and lasting dissensions is a ground upon which a court of equity will decree a dissolution. So, too, when the whole scheme is found to be visionary or founded upon erroneous principles (*Collyer on Partnership, sec.* 297; 3 *Kent's Commentaries*, 68, *and cases cited*).

The state of feeling between the members of this association, shown by the evidence, appears to me to bring this case within the authorities referred to, and to call for the appointment of a receiver for an adjustment of the accounts of the association, and for a decree of dissolution. If the parties can agree upon a responsible and trustworthy person as receiver, I will appoint him.

As I have found that the dissolution is necessary, on account of the acts of both of the factions in the association, no costs are allowed.

N. Y. COMMON PLEAS.

WILLIAM CONROY agt. THE TWENTY-THIRD STREET R. R. Co.

Negligence — contributory negligence — railroads.

A railroad company is bound to keep its track in good order and repair, and if it carelessly or negligently fails or omits to do so, and an injury occurs in consequence thereof, it will be liable in damages.

It is equally incumbent upon them to keep those parts of its road proximately connected with its track in good order and repair, and they are negligent if they omit to have such repairs made, not only to their track, but to contiguous portions of their road, as will keep it in good condition, and make it safe for those who have a right to drive across it.

To entitle a party to recover in an action for negligence, it must appear that there was no negligence on his part which contributed to the injury.

Contributory negligence is a question for a jury to decide, and where the court, as in this case, instructs the jury that, if the driver of the horse, by the want of proper observation, attention or circumspection, under the circumstances contributed in any sensible degree to the accident, the defendant would not be liable; the instruction is a correct and proper one.

General Term, November, 1875.

Before DALY, *Ch. J.*, LOEW *and* J. F. DALY, *JJ.*

APPEAL from a judgment of the general term of the marine court of the city of New York affirming a judgment in favor of the plaintiff, entered upon the verdict of a jury.

Flanagan & Bright, for defendant.

Robertson & McCarthy and James Clark, for plaintiff.

Conroy agt. Twenty-third Street R. R. Co.

LOEW, *J.*— This action was brought by the plaintiff to recover damages for an injury sustained by his horse by reason of the alleged carelessness and negligence of the defendant. The testimony shows that, on the 13th day of October, 1873, while an employe of the plaintiff was in the act of driving the plaintiff's team across the railroad track, in Twenty-third street, near the Thirteenth avenue, the fore foot of one of the horses sunk into a hole in the street. This hole was close to the inner edge of the north rail of the track. It was about six or seven inches in width and depth, and about four feet in length. The horse's hoof was caught under the rail, and one-half of it was torn off in the animal's efforts to extricate it.

It seems that the portion of the track where the accident occurred was originally laid by the Bleecker Street Railroad Company. But the evidence shows that, in December, 1872, the defendant commenced using it, as well under a right derived from its charter as by an express license from the Bleecker street company; that from that time to the date of the accident the portion of the track in question was used exclusively by the defendant, and furthermore, that the Bleecker street company had not used the same for a year or two before the defendant began to use it. Under these circumstances we think that, as to third parties, it was incumbent on the defendant to maintain and keep the part of its track referred to in as good repair and condition as the other portions which it had originally laid. A railroad company is bound to keep its tracks in good order and repair, and if it carelessly or negligently fails or omits to do so, and an injury occurs in consequence thereof, it will be liable in damages (*Worcester* agt. *The Forty-second St. R. R. Co.*, 3 *Daly*, 278; *S. C.*, 50 *N. Y.*, 203). The defect by reason of which the plaintiff's horse was injured was proximately connected with the track. It could readily be seen by the employes of the defendant who were stationed at that particular place, and one of them admitted, on cross-examination, that he had

seen it and that it had existed for three or four weeks before the accident occurred. The defendant was, therefore, clearly negligent in omitting to have such repairs made to its track as would have put it in a good condition and made it safe for those who had a right to drive across it.

The negligence of the defendant being thus established there was, in this case, but a single question to submit to the jury, and that was, whether or not the plaintiff's employe was guilty of contributory negligence. On this point the evidence was conflicting. The plaintiff's driver testified that, at the time in question, he could not see the hole from the wagon, because it was filled with water. He was corroborated in this respect by another witness, who testified on the part of the plaintiff. On the other hand, there was some testimony given on the part of the defendant which tended to show that there was no water in the hole at that time; that the place was dangerous, and that if the plaintiff's employe had driven his horses a little further to the eastward he might have crossed in perfect safety. However this may be, the question of contributory negligence was fairly left to the jury. They were instructed, by the court, that if the driver, by the want of proper observation, attention or circumspection, under the circumstances, contributed, in any sensible degree to the accident, the defendant would not be liable. This instruction was correct, and the jury, by their general verdict in favor of the plaintiff, and also by their special finding to a question submitted to them by the court, that the dangerous character of the hole was not apparent to an ordinary observer, determined that the plaintiff's driver was not chargeable with contributory negligence.

It is claimed, however, that the learned chief justice of the marine court erred in his charge to the jury relative to the damages they were at liberty to award to the plaintiff. He told the jury, among other things: "It is not the value of the horse you have to consider, it is the injury done to the plaintiff in his business." And, again: "In compensating the

plaintiff for the losses he sustained by the injury to his horse, it will be for you to say whether that injury was to the extent of the value of the horse. It might have been less, it might have been a great deal more." This instruction was manifestly erroneous and was admitted to be so by the respondent's counsel on the argument, because, even conceding that such damages might be recovered in such a case, the plaintiff did not claim, nor is there a particle of evidence to show, that he sustained any such damages.

But although the court below erred in the portion of the charge referred to, yet we think that the error in this regard presents no substantial ground for a reversal of the judgment for the reason that the learned judge subsequently also instructed the jury that in this case the claim was limited to the value of the horse. Now the uncontradicted testimony, given on the part of the plaintiff, shows that the horse was worth $300 before he was injured, and that in consequence of the injury he became worthless. The witness Terring who has charge of the defendant's stables and horses, and who testified on the part of the defendant, did not and could not contradict the plaintiff's witnesses on this point. He had never seen the plaintiff's horse, and his testimony only tended to show that such an injury as the horse had received would not necessarily be a permanent one. But this was admitted by the veterinary surgeon who had the horse in charge after the accident. He testified, on the part of the plaintiff, that the horse might possibly become serviceable again after six or twelve months, after the hoof had time to grow on. Nevertheless, both before and after giving this testimony he also testified that after the accident the horse was worth nothing and ought to have been killed.

The fact that this same witness sold the horse for thirty-eight dollars, which sum he retained for the care and keep of the horse for forty-three days after the accident, has no material bearing on the question of value. If a person choose to pay the sum mentioned for a worthless animal and take the

chances of its ultimately becoming serviceable again after six or twelve months of unremitting care, attention and expense, that was a matter which could not affect the rights of the respective parties to this action.

The undisputed testimony given on the part of the plaintiff, that previous to the injury the horse was worth $300 and that afterwards he was worth absolutely nothing, still remained. On that the court would have been authorized to direct the jury to find a verdict in favor of the plaintiff for $300, in case they came to the conclusion that the concurring negligence of his employe did not contribute to the injury. The question of contributory negligence once settled in the plaintiff's favor, it was immaterial that the judge erred in his charge to the jury in reference to the measure of damages, provided only that he reached a correct conclusion on the subject. This he did by instructing them that the plaintiff's right of recovery was "limited to the value of the horse." That value, as we have already seen, was proven to be $300, and for that amount the jury found a verdict. As the correct and only possible legal result was attained, the defendant was not injured by the errors referred to, and has therefore no right to complain.

For the reasons above given the judgment appealed from should be affirmed, with costs.

DALY, Ch. J., and J. F. DALY, J., concurred.

N. Y. SUPERIOR COURT.

RICHARD D. CROTTY agt. DUNCAN E. MACKENZIE.

Costs — attorney's lien — when it attaches — how protected — execution for.

An attorney has a lien on a judgment, not only for the actual costs, but for any portion of the damages which may have been stipulated, for his compensation; but he has no lien until the judgment is entered, or at least not until after verdict.

To protect the lien of an attorney for his costs and expenses against the settlement of a judgment, he must give notice of the lien to the judgment debtor, and where the judgment issues for both damages and costs such lien can be protected in no other way.

Where a plaintiff recovered a judgment for a certain amount, included in which was the taxed costs, and a specified sum agreed by the plaintiff to be paid to his attorney, and afterward the plaintiff and the defendant's attorneys entered into an arrangement by which the judgment was paid and satisfied, without the knowledge of plaintiff's attorney, who, upon its discovery, issued an execution on said judgment requiring the sheriff to levy the amount of his costs and counsel fee: *held*, that such execution must be set aside; the more just and equitable rule being that the plaintiff's attorney should, before attempting to enforce his lien, be required to give notice of the lien to the judgment debtor, and that it would be better to apply to the court before he issues his execution for an order to vacate the satisfaction of the judgment.

This would seem to be adverse to *Sweet* agt. *Bartlett* (4 *Sandf.*, 661).

Special Term, October, 1876.

MOTION by defendant to set aside execution and levy.

Mr. Joline, for the motion.

Mr. Southworth, opposed.

CURTIS, *C. J.*— The plaintiff recovered judgment August 31, 1876, for $273.80. The defendant appealed to the general term. The judgment included plaintiff's taxed costs, $160.80, and fifty dollars agreed by the plaintiff to be paid to his attorney. The plaintiff and the defendant's attorneys entered into an arrangement by which the judgment was paid and satisfied October 17, 1876, without the knowledge of the plaintiff's attorney. The latter, upon discovering it, issues an execution on the judgment, requiring the sheriff to levy the amount of his costs and counsel fee. The defendant now moves to vacate this levy and execution, and the attorney claims that his client, the plaintiff, is pecuniarily irresponsible, and that the parties entered into the arrangement in order to defraud him of his costs, and with knowledge of his lien.

There is no substantial proof impeaching the good faith of the satisfaction of the judgment, and it does not appear that the plaintiff's attorney took the precaution to protect his lien for costs by serving a notice of it upon the judgment debtor. The lien and the right to enforce it are controverted on the part of the defendant.

In *Rooney* agt. *The Second Ave. R. R. Co.* (18 *N. Y.*, 368), the somewhat divergent views expressed in reference to the effect of the Code upon the lien of an attorney upon the judgment recovered by him are considered, and the conclusion is arrived at that such lien is not abolished and is not measured by the actual costs, but covers any portion of the damages which may have been stipulated for the compensation of the attorney's services. This court early took this position, and refused to set aside an execution issued by the plaintiff's attorneys to collect the costs, on which they had a lien by judgment, when the plaintiff and defendant without their knowledge had settled the litigation and satisfied the judgment. OAKLEY, C. J. (all the rest of the judges concurring), stated that it was the determination of the court to sustain the lien of the attorney, and that when his rights to the

costs was established the court would protect it so far as it could, because, however the matter might be technically, the costs were in reality his property. It was further held that an attorney had no lien for his costs until a judgment was entered, or at least not until after verdict, and that until the lien attaches, the parties can settle the suit regardless of his claim for costs. But after the attorney's right to costs is fixed by a verdict or judgment, then the parties are no longer at liberty to settle, disregarding his interest in the matter (*Sweet* agt. *Bartlett*, 4 *Sandf.*, 661).

In the case of *Ward* agt. *Syne* (9 *How. Pr.*, 16), it was also held by the general term of the court of common pleas (judges DALY and WOODRUFF concurring), that the Code did not affect the attorney's lien for his services.

In *Ackerman* agt. *Ackerman* (14 *Abb. Pr.*, 229), the general term of the court of common pleas held that although the lien of the attorney for costs was one which the court would enforce, yet payment by a judgment debtor to a judgment creditor of the judgment was valid against the lien of the attorney, unless the debtor had notice of the attorney's claim by way of lien to a portion of such judgment.

It was also held that although an execution could be issued upon a judgment which had been satisfied, yet that if the satisfaction was voidable for any cause, it must be vacated by the court before execution could be issued.

In *Bishop* agt. *Garcia* (14 *Abb. Pr.* [*N. S.*], 72), the principle was concurred in, that if an attorney desires to protect his lien for costs and expenses against the settlement of a judgment, he must give notice of the lien to the judgment debtor.

In *Sweet* agt. *Bartlett* (*supra*), the defendants do not appear to have raised the objection that they had not been notified of the attorney's lien for costs, and the effect of such an omission on the part of the plaintiff is not considered; but as that arises in the present case, it would seem a more just and equitable rule that the plaintiff's attorney should, before

attempting to enforce his lien, be required to give such notice, and that it would be better to apply to the court, before he issues his execution, for an order to vacate the satisfaction of the judgment.

In *Marshall* agt. *Meeks* (51 *N. Y.*, 140), these views as to an attorney's lien for his costs are confirmed, and it was held that where the judgment was for costs only it was in itself a legal notice of the lien, which could be discharged only by payment to the attorney, and by a divided court it was held that where the judgment issues for both damages and costs such lien could only be protected by notifying the judgment debtor. This mode of protecting this lien by such notice is recognized in *Pulver* agt. *Harris* (53 *N. Y.*, 73), and in *Lesher* agt. *Roessner* (3 *Hun*, 217).

It is with reluctance I feel constrained by the weight of the later authorities to set aside an execution issued in accordance with what might seem to be the settled practice of this court, as expressed in *Sweet* agt. *Bartlett* (*supra*).

The execution and levy sought to be set aside on the part of the defendants must be vacated, but without costs.

SUPREME COURT.

FRANCIS GREAVES agt. HENRY A. GOUGE.

When corporation a necessary party to an action against its president, trustees or directors.

To an action brought by a stockholder against the president, trustees or directors of a corporation for an alleged conversion or misappropriation by them of corporate property, the corporation itself is a necessary party (*Affirming S. C.*, 49 *How.*, 79).

First Department, General Term, October, 1876.

APPEAL from order sustaining demurrer to a complaint.

Horatio F. Averill & W. B. Milliken, for plaintiff.

Oscar Frisbee, for defendant.

BRADY, *J.* — The conclusions arrived at by the learned judge presiding at special term are correct expositions of the law applicable to the case made by the complaint. It is justly said by him, in his opinion, that the several acts of the defendant, charged to have been illegal and prejudicial, were injuries directly to the corporation of which he was the president, and in which the plaintiff was a stockholder.

They consist, he says, of the conversion by the defendant to his own use of the whole surplus earnings of the corporation; the illegal appropriation to himself of its funds to the amount of $4,000 a year since the corporation was formed; the further appropriation to himself and to his own individual use, and that illegally, of personal property and chat-

tels of the corporation; the payment with corporate funds for work and labor rendered for his individual benefit; and the pledging of the credit of the corporation and the use of its funds and notes for his own, and not the company's, advantage.

This statement makes it apparent that there is little difference between the plaintiff's case and that of the plaintiff in *Gardner et al.* agt. *Pollard et al.* (10 *Bos. R.*, 675). It contains similar elements, and seeks a similar remedy. It must meet a similar fate. It is not deemed necessary to demonstrate this by a review in detail of the various decisions relating to the right of a stockholder, in his own name, to maintain an action against one or more of the directors or officers of a corporation for alleged injuries to his stock, or its ownership, caused by illegal or fraudulent acts. It is sufficient to state the rule deducible from them which governs such a litigation, and that rule seems to declare it to be an indispensable prerequisite that the circumstances disclosed should show injuries, individual and personal, to the claimant, as contradistinguished from injuries to the corporation. The reason of the rule is well stated in *Gardner* agt. *Pollard* (*supra*), by BOSWORTH, J., namely: that if he can maintain a suit and recover his aliquot part of the whole damages, he may obtain a double compensation by means of the recovery in his action, and in one by the corporation for the same cause. If, as said in that case, all the moneys misappropriated by the defendant, or improperly received and retained by him, rendered the company insolvent, and thereby made his stock valueless, a recovery of the money by the corporation itself, with interest, might restore the value of the stock and enable the company to make the omitted dividends. The learned justice at special term presented this view substantially, and sufficiently covered all the points which he was called upon to consider, and disposed of them in an opinion which will stand the test of any review to which it may be subjected.

It may not be amiss here, however, to state, in a brief way, the classes of wrongs for which a plaintiff, in the absence of any statute prescribing a remedy, has been allowed to recover individual damages against a director or officer of a company without seeking the aid of the corporation, or making it a defendant, or uniting with him as plaintiffs others similarly situated. It will be found, on examination of the authorities, that they are either when the director or officer was guilty of fraudulent representations by which the stockholder was induced to buy the stock, or when, by fraudulently issuing spurious stock for which the company was not liable, he becomes a wrong-doer, and therefore responsible for the evil he has done. The following cases are relied upon as establishing this proposition: *Cross* agt. *Sackett* (6 *Abb.*, 247, *and numerous cases cited*); *Gardner* agt. *Pollard* (*supra, and cases cited*); *Mead* agt. *Mali* (15 *How. Pr. Rep.*, 349); *Seeser* agt. *Mali* (6 *Abb.*, 270, *and note*); *Casseaux* agt. *Mali* (25 *Barbour's Rep.*, 578); *see, also, Robinson* agt. *Smith* (3 *Paige*, 222); *Cunningham* agt. *Pell* (5 *Paige*, 687); *Smith* agt. *Hurd* (12 *Metcalfe*, 371). The case of *Crooks* agt. *Jewett* (12 *How.*, 19), which was a motion to vacate an order of arrest, is the only case which seems to conflict with the view stated. It is a special term case, and is too general in its character on the question to be entitled to superior consideration. It stands alone on the broad rule adopted by it. The weight of authority is decidedly against it. There is, it may be said, no particular severity about the proposition stated. If the corporation refused to proceed against the directors, the plaintiff has his remedy by making them a defendant. This devotion to what seems to be a mere form is a matter of substance for the reason stated herein, that the plaintiff shall not be allowed a double compensation, or the defendant be subjected to a double punishment, which might result from a claim prosecuted by the corporation to recover its damages arising upon the same state of facts. When the plaintiff is able, by the peculiar and special circumstances of his case, to

disconnect himself from the general injury to the company, he then presents an independent demand for which he can receive but one redress, and for which the defendant can pay but one penalty. The distinction is apparently, to some extent, shadowy, and finely drawn, but it has substance, as already suggested, and rests upon principle and authority.

The order made at special term must, therefore, be affirmed, with costs.

SUPREME COURT.

LOUIS F. THERASSON and CHARLOTTE W., his wife, agt. LOOMIS L. WHITE and others.

Partition of lands — adverse possession — jury trial.

In order to enable a party to maintain an action for the partition of lands, he must not only have an estate in the premises, as a joint tenant, or tenant in common, but he must be in the actual or constructive possession of his individual share or interest.

Where the premises are held adversely, the party out of possession cannot try the question of title in this form of action. It is a question for the determination of a jury.

Special Term, February, 1876.

Wm. A. Beach & Aaron J. Vanderpoel, for plaintiffs.

Wheeler H. Peckham, for the executors of Francis W. Worth.

Dunning & Edsall, for the tenants.

Silas B. Brownell, for Anna Worth.

VAN VORST, *J.* — This is an action for the partition of lands. The plaintiff Louis F. Therasson, in his complaint, alleges that he, together with Francis W. Worth, now deceased, were, at the time of the commencement of this action, and until the death of Worth, on or about the 17th day of September, 1873, seized in fee, and held and were in possession of, as tenants in common, the parcel of land sought to be partitioned.

That subsequent to the death of Worth, the plaintiff Louis F. Therasson, and the defendants White and Jarvis, as executors and trustees under the last will and testament of Worth, were seized in fee and held, and are in possession, as tenants in common, of the lands in question. That the plaintiff Louis F. Therasson has an estate of inheritance therein, consisting of one undivided half-part thereof as tenant in common with the said executors and trustees, who are alleged to have a similar estate in the same. That the defendant Anna Worth, the widow of Francis W. Worth, has a right of dower in respect of the undivided share or interest in said premises which belonged to her husband. The answer of the executors and trustees White and Jarvis puts in issue the allegations of the complaint, setting up the seizin and holding, and the possession of the plaintiff, Louis F. Therasson, as tenant in common with Francis W. Worth, in his lifetime, or with them as executors and trustees, since the death of Worth. It also puts in issue the allegations of the complaint, that the plaintiff has an estate of inheritance therein as tenant in common with them as executors and trustees.

The answer sets up, for a second defense, that the cause of action stated in the complaint did not accrue to the plaintiff within ten years from the commencement of this action.

For a third defense the answer of the executors and trustees sets up that the premises described in the complaint have been, for more than twenty years, and before the commencement of this action, held and possessed adversely to any title or claim of the plaintiff, and that there has been an actual, continued occupation of the premises under a claim of title, for more than twenty years before the commencement of this action, adverse to any claim or title of the plaintiffs or of those under whom they claim.

The answer of the defendant Anna Worth also denies the seizin and possession of the plaintiff, as alleged in the complaint. It alleges that, at the time of the execution and delivery of the deed of conveyance to the plaintiff Louis F.

Therasson, under which he claims title, the lands described in the complaint were in the possession of one James Rowe, claiming under a title adverse to that of the grantor in the deed to Louis F. Therrasson. The answer also interposes the defenses of the statute of limitations, and of an adverse possession and holding, as pleaded by the executors of Worth.

It thus appears that the answers of the defendants put in issue, distinctly and clearly, the question as to whether the plaintiff Louis F. Therasson has such title and possession of the premises as will uphold his action for partition. The statutes provide that when several persons shall hold and be in possession of any lands, tenements or hereditaments as joint tenants, or as tenants in common, in which one or more of them shall have estates of inheritance or for life, or for years, any one or more of such persons, being of full age, may apply for a division and partition of such premises (2 *R. S.*, *p.* 317, § 1). Under this provision it has been held that the party instituting the proceedings must have an estate entitling him to immediate possession (*Brownell* agt. *Brownell*, 19 *Wend.*, 367).

It is true it was said in that case that possession would follow the legal title, no adverse possession having been shown. The provisions of the statute, it was stated, do not require a "*pedis possessio*" to entitle a party to institute proceedings in partition. It has also been decided that the party asking a partition of lands must not only have a present estate in the premises as a joint tenant or tenant in common, but that he must be in the actual or constructive possession of his individual share or interest (*Burhams* agt. *Burhams*, 2 *Barb. Ch.*, 398). In that case the chancellor also held, that it was the intention of the revisers to exclude a party from instituting a partition suit for the division of premises held adversely to him until after he had obtained possession of his share of the premises or of some part thereof, by ejectment or otherwise. The chancellor also held that, "if the com-

plainant had been ousted of his possession, or if the premises were held adversely, the defendant should set up the defense by plea or answer." The chancellor also stated, "that in such case the proper course for the court is to dismiss the plaintiff's bill as prematurely filed, but without prejudice to the complainant's right to institute a new suit for the partition of the premises after he should have obtained possession of his undivided share or interest."

But it appears that the fact of adverse possession in that case was stated in the bill itself. In *O'Dougherty* agt. *Aldrich* (5 *Denio*, 388), it was decided that the plaintiff, to make out his case, *must show* that he was either in actual or constructive possession. This case also substantially holds that a question of title could not be tried in a suit for partition; that the plaintiff, in case of contention on that subject, must first establish his title by ejectment (*Jenkins* agt. *Van Schaick*, 3 *Paige*, 242; *Clapp* agt. *Bromagham*, 9 *Cowen*, 530). The case of *Blakely* agt. *Calden* (15 *N. Y.*, 617), is, in some respects, in conflict with *Brownell* agt. *Brownell*, and other cases above cited, and holds that, although the plaintiff, in a partition suit, must be in the possession of the premises, yet it is not necessary that he should be the actual occupant or should hold an immediate present interest, and that an existing life estate, although covering the whole premises, will not prevent the remainderman from being deemed in possession within the meaning of the statute. Yet that case does not decide that when an adverse possession is set up it may be tried in the partition suit (*Houell* agt. *Mills*, 56 *N. Y.*, 226, *affirms Blakely* agt. *Calden*). Although where the title is not in dispute partition is a matter of right, still it has been decided that a court of equity will not entertain a bill for partition when the legal title is disputed or doubtful. A court of law is the proper tribunal to determine that question (*Hosford* agt. *Mervin*, 5 *Barb. Sup. Ct. Rep.*, 52).

In *Clapp* agt. *Bromagham* (*supra*), it was said: "Whether there be an adverse possession, is a *question of fact for the*

jury," and that a judgment in partition does not change the possession but "in ejectment or writ of right it would be conclusive between the parties." *Wilkin* agt. *Wilkin* (1 *Johns. Ch.*), holds that "the court will not sustain a bill for a partition, where the title is *denied*, or is not clearly established." *Phelps* agt. *Green* (3 *Johns. Ch.*, 303), holds that "where the title is suspicious or litigated it must first be established at law before this court will interfere."

These cases were nearly all under the former system of judicial procedure, and it is claimed by the learned counsel for the plaintiffs, that under the present powers and jurisdiction of this court, where legal and equitable administration are both exercised, the objection above suggested is unavailing, and that a question of title may be examined and determined in an action of partition. But yet *Florence* agt. *Hopkins* (46 *N. Y.*, 182), holds that where the premises are held adversely the party out of possession cannot try the question of his title in this form of action: "The action is not for the recovery of the premises held adversely."

And to the same effect is the late case of *Schuyler* agt. *Mulford* (59 *N. Y.*, 430). ALLEN, J., says: "The form of action (partition) is at least a doubtful proceeding for the trial of adverse or hostile claims to real property. The title of the parties should be first established by the proper action, before proceedings taken for partition. There should be a tenancy in common, and an actual or constructive possession by the plaintiffs."

In *O'Dougherty* agt. *Aldrich* (*supra*), it was held, as before observed, that the *plaintiff must show* that he was actually or constructively in possession. This puts the burden on him.

The plaintiffs' title under the cases must be clear, unlitigated, without suspicion and freed from doubt. His possession must be actual or constructive, clearly and indisputably so.

The plaintiffs' title and possession are controverted com-

pletely by the answers of the defendants, and is a subject of serious doubt at least under the evidence as a question of fact. I cannot think that such question of fact should be tried by the court without a jury, nor that I should pronounce upon the evidence whether an adverse possession be established completely. A good and sufficient reason why a claim of title cannot be tried in this action, but should abide the judgment of an action in ejectment, is found in the fact that a defendant in ejectment is entitled to a trial by jury, and the unsuccessful party in ejectment is entitled of right to a new trial, at any time within three years after the judgment against him, upon payment of costs and damages (2 *R. S.*, *page* 309 [318], *sec.* 37). And the court, within two years after a judgment on a second trial, on application and cause shown, may vacate judgment and grant a third trial (3 *Wait's Pr.*, 417; 5 *id.*, 16). If this action be maintained and a judgment of partition be ordered, it could only be on the ground that the title and possession of the plaintiffs are so clearly established that there is no evidence of ouster or adverse possession. That, I am not prepared to hold. A full consideration of the evidence shows that the plaintiffs' title and possession are subjects of earnest and substantial contention.

It is claimed by the defendant's counsel that the evidence establishes that Rowe, the defendant's grantor, in his lifetime, claimed and was in the actual possession of the entire premises. That he asserted acts of ownership to the entire exclusion of the plaintiffs' grantor. That he leased the premises for long terms to various tenants, through a series of years, in his own name, and received the rents to his own individual use, exclusive of any claim in others, and that without dispute or question. That he individually bore and sustained all the burdens of taxation and assessments for local improvements upon the lands for a period of over twenty years. That his possession, claims and acts were wholly inconsistent with any right or claim in others and amounted to a complete ouster. That the evidence shows that the pos-

session of Rowe and his successors in interest were in fact adverse.

That raises questions of fact for a jury. In this view of the case I do not think that the action for partition can be now maintained.

I will let the action stand over for a time to enable the plaintiff to bring an action or actions of ejectment for the premises in question. And in case such action or actions be brought within two months, this suit is to remain in *statu quo* until the decision of such ejectment. If no such action be brought within two months, the complaint to be dismissed with costs.

NOTE.—The decision was subsequently modified, and upon the defendant's application, the plaintiff consenting, an order was made for the framing of issues, by which the question of adverse possession was directed to be tried in the action, before a jury.

SUPREME COURT.

LEOPOLD BERRINGER agt. MAX SCHAEFER.

Reformation of a written instrument — what necessary to be shown.

It is necessary, to entitle a party to a decree of a court of equity reforming a written instrument, for him to show first a plain mistake clearly made out by satisfactory proofs.

In the second place he must show that the material stipulation which he claims should be omitted or inserted in the instrument, was omitted or inserted contrary to the intent of both parties, and under a mutual mistake.

The burden of proof is upon the plaintiff, and before undertaking to alter the terms of the agreement as signed by the parties, the court should be satisfied beyond any reasonable doubt that the plaintiff has made out his case.

Special Term, November, 1875.

A. Cardozo, for plaintiff.

J. K. Porter & E. Fitch, for defendant.

LAWRENCE, *J.* — The rule which governs cases of this character is well stated by judge BROWN in delivering the opinion of the court of appeals in the case of *Nevius* agt. *Dunlap* (33 *N. Y.*, 680). He says: "To entitle a party to a decree of a court of equity reforming a written instrument, he must show, first, a plain mistake, clearly made out by satisfactory proofs. Whenever the evidence is loose, equivocal or contradictory, or is in its texture open to doubt or opposing presumptions, the relief will not be granted (*citing Story's Equity J.*, 157). This presumption is obvious,

because the written instrument, carefully and deliberately prepared and executed, is evidence of the highest character, and will be presumed to express the intention of the parties to it, until the contrary appears by clear, positive and unequivocal evidence. In the second place, he must show that the material stipulation which he claims should be admitted or inserted in the instrument was omitted or inserted contrary to the intention of both parties, and under a mutual mistake. It is not enough to show that he made a mistake himself; that through inadvertence and error on his part he executed an instrument the stipulations of which do not express what he intended. He must also show that the other contracting party labored under a similar delusion" (*see also Kent* agt. *Manchester*, 29 *Barb.*, 597, 598; *Jackson* agt. *Andrews*, 59 *N. Y.*, 244; *Story* agt. *Conger*, 36 *N. Y.*, 673). In this case, after very carefully studying the evidence, I cannot say that the plaintiff has made out by clear, or positive, or unequivocal evidence, that the defendant knew or was informed of the restrictions as to the use of the premises in question, which restrictions are contained in the Lenox deed, nor that with knowledge that such restrictions existed, the defendant contracted to purchase the property. The burthen of proof is upon the plaintiff, and before undertaking to alter the terms of the agreement, as signed by the parties, the court should be satisfied, beyond any reasonable doubt, that the plaintiff has made out his case.

Here I do not think that the plaintiff has succeeded; the evidence is exceedingly contradictory, and so far as the surrounding circumstances can be looked at, for the purpose of determining the relative probabilities of the statements made by the witnesses on either side, those circumstances appear to be quite as favorable to the defendant as to the plaintiff.

The learned counsel for the defendant argued, if I correctly understood him, that as Schaefer desired to use the premises for a dwelling, it was not at all likely that the fact that the land could not be used for certain business purposes would

depreciate the property in his estimation. In view of the fact that the defendant expressly states that he bought the property for an investment, even if he intended in the first instance to use it as a dwelling, the court cannot speculatively determine that the defendant would not regard the restrictions as disadvantageous, and calculated to depreciate the value of the property in the future. An intention to use property when purchased for the purposes of a residence, does not conflict with an opinion that its actual value will be much less to the purchaser if by his deed he is restricted from using it for a theater, an opera house or a railroad depot in the future.

Having reached the conclusion that the plaintiff has not, within the rules referred to, made out a case for the reformation of the written agreement executed by the parties, it is clear that the plaintiff has not tendered performance of his contract, either actually or in substance, and that he is unable to make such performance.

The contract called for a proper deed for conveying and assuring the fee simple of the premises conveyed, free from all incumbrances. The restrictions in the Lenox deed constituted an incumbrance (*Gilbert* agt. *Peteler*, 38 *N. Y.*, 165; *Brown* agt. *Jones*, 23 *Barb.*, 153; *Barron* agt. *Richards*, 8 *Paige*, 357; *see Plumb* agt. *Talbut*, 41 *N. Y.*, 442; *Matter of Whitlock*, 10 *Abb.*, 316; *Talmadge* agt. *East River Bank*, 26 *N. Y.*, 105).

Nor can I assent to the claim made by the plaintiff's counsel, that, adopting the defendant's own evidence as true, the taking of the keys of the house by the defendant for the purpose of entering to make alterations, and the work done by him upon the premises, preclude him from alleging that the contract should be enforced as contained and expressed in the written agreement. The communication made by Hurst to the plaintiff, relative to the restrictions, was made (according to the defendant) *after* the agreement had been signed. Hurst was not a party to the transaction; he had, as he himself tells

us, gone to the house to see if the bargain went through, and with the intention of levying an attachment upon commissions. The defendant at that time had his written contract, on which he was entitled to stand; and the mere declaration of a third party, having no interest in the premises, that the restrictions existed, was a declaration which the defendant was entitled to disregard, at least until he had had an opportunity of putting the matter into the hands of his legal adviser; and the defendant's evidence, as I understand it, shows that when he was advised by his counsel of the nature and character of the restrictions, he returned the keys and surrendered the premises.

On the whole case I am of the opinion:

First. That the plaintiff has failed within well settled rules to make out a case entitling him to a judgment that the contract be reformed.

Second. That the evidence does not establish any acts on the part of the defendant, after he had ascertained that the property was subject to certain restrictions as to its use, indicating a waiver of, or intention to waive, his legal rights, as expressed in the written agreement.

Third. That the complaint must be dismissed, with costs.

IN THE MATTER OF THE PETITION OF EUGENIE BARBER BARNETT, for the custody of GEORGE SAMUEL BARNETT, a minor, under *habeas corpus*.

A writ of *habeas corpus* is a special proceeding within the meaning of section 3 of the Code.

Costs are allowable in the discretion of the court, and when so allowed shall be at the rate allowed for similar services in civil actions.

No extra allowance can be allowed; that relates only to actions.

Special Term, October, 1876.

APPEAL from the taxation of the clerk of the supreme court, first department, allowing costs as in an action, to the special term.

On the application of Eugenie Barber Barnett, the mother of a bastard child, named George Samuel Barnett, aged five years, the supreme court granted a writ of *habeas corpus* to obtain possession of said minor child from David Barnett, its putative father. Return was made charging gross improprieties on the part of the petitioner, to which a traverse was filed denying the charges, and making countercharges against respondent. The issues thus joined were referred to William Sinclair, esq., who reported in favor of the petitioner, and awarded the custody to the petitioner, and afterward such report was confirmed by the court, and at the same time an order was made awarding costs and disbursements of the proceedings to the petitioner, and subsequently such costs were adjusted by the clerk, as follows:

Before order of reference	$25 00
After order of reference.....	15 00
Carried forward	$40 00

Matter of Barnett.

Brought forward		$40 00
Trial, issue of fact		30 00
Trial, occupying more than two days		10 00
Costs of order confirming referee's report		10 00
		$90 00
Disbursements:		
Referee's fees	$100 00	
Other disbursements	5 25	
		105 25
		$195 25

From this taxation of the clerk an appeal was taken to the special term.

L. B. Clark, for appellant. Costs on *habeas corpus* proceedings are unknown to the profession. There is no law authorizing them, nor is there any case authorizing them.

Charles Blandy, for respondent.

I. Costs are allowed in special proceedings, in the discretion of the court, and when so allowed shall be at the rate allowed for similar proceedings in a civil action (*Laws of* 1853, *sec.* 15, *art. I, chap. IX, title* 3, *part* 3 *of R. S.; Code, sec.* 3; *In the Matter of Dodd*, 27 *N. Y.*, 629; *In the Matter of, &c., Rens. and Sara. R. R. Co.* agt. *Davis*, 55 *id.*, 145).

II. A *habeas corpus* is a special proceeding (*In the Matter of the extension of the Bowery*, 12 *How.*, 99; *In the Matter of Dodd*, 27 *N. Y.*, 629; *In the Matter of, &c., Rens. and Sara. R. R. Co.* agt. *Davis*, 55 *id.*, 145).

III. The order of Mr. justice DONOHUE awarding costs cannot be reviewed on this appeal.

BARRETT, *J.*— There seems to have been some conflict as to what is a special proceeding (27 *N. Y.*, 629; 20 *How.*, 304; 4 *Keys*, 66).

But none of the cases doubt that where the matter is in court, and not merely before a judicial officer out of court, section 3 of the Code applies. The present proceeding was in the court. The writ was returnable thereto, and the final judgment was at special term. Under these circumstances 55 *N. Y.*, is applicable, and the taxation must be affirmed.

Taxation affirmed.

SUPREME COURT.

CHARLES STANDACHER agt. SIMON PREGENZER.

Arrest — discharge from — how obtained — supersedeas.

The proper remedy for the discharge of a person held in custody, after a surrender or delivery of his bail, and after the statutory time has elapsed in which he must be charged on execution, is by *supersedeas* (2 *R. S.* [*Edm. ed.*], *p.* 577, *sec.* 37).

The time within which a defendant must be charged on execution, before a supersedeas can be moved for, is to be computed from the time the judgment is actually entered, not from the time the plaintiff is entitled to judgment.

Any evidence of the entry of judgment three months prior to the application for the *supersedeas* or of a failure to charge the defendant in execution three months after the surrender, is sufficient, and where such proof is furnished and not denied, the defendant must be discharged.

Special Term, November, 1876.

Charles H. Smith, for motion.

J. L. Lindsay, opposed.

LAWRENCE, *J.* — The proper remedy of the defendant is by *supersedeas* (2 *R. S.* [*Edmond's ed.*], *p.* 577, *sec.* 37; *and see Smith* agt. *Knapp*, 30 *N. Y.*, *p.* 590). The statute provides that where any defendant shall be in custody upon a surrender or delivery of his bail made after judgment obtained against him, and such bail shall be thereupon exonerated, the plaintiff in such judgment shall charge such defendant, on execution thereon, within three months after such surrender, or, if an execution against the property of such defendant shall have been issued, within three months after the return

day of such execution. The time within which a defendant must be charged on execution before a *supersedeas* can be moved for is to be computed from the time the judgment is actually entered, not from the time the plaintiff is entitled to judgment (*Tippman* agt. *Petentzer*, 18 *How. P. R.*, 270). In this case judgment was entered December 9, 1875. The defendant was surrendered by his bail July 29, 1876; and the bail exonerated September, 22, 1876, by an order of the court, and no execution issued against the defendant's person since his surrender. Three months have therefore elapsed, not only from the time of the entry of judgment, but also since the defendant's surrender by his bail. In any aspect, therefore, the defendant is entitled to his discharge, unless, under section 37 of 2 Revised Statutes, 577, good cause is shown to the contrary. No such cause is shown, and no affidavits are read on the part of the plaintiff to show such cause. The affidavit shows when judgment was rendered, and when the bail surrendered the defendant; and the opinion of the court (9 *Abbott*, 209–220), referred to by the plaintiff's counsel (*see same case*, 18 *How.*, 270), does not state that, where such facts are shown and not disputed, it is necessary to produce a certified copy of the docket. Judge DALY, in that case, maintained that it must be shown that judgment had been entered, and he cited *Dunlop's Practice*, which states that a certified copy of the docket must be produced. In the case before him no judgment had been entered, and he was simply pointing out the fact that it must affirmatively appear that judgment had been entered, and the citation from *Dunlop* was made for that purpose. In my opinion, any evidence of the entry of judgment three months prior to the application for the *supersedeas*, or of a failure to charge the defendant in execution three months after the surrender, is sufficient. Such proof is furnished, and not denied, in this case. The defendant must, therefore, be discharged.

SUPREME COURT.

JAMES VAN WART agt. THE MAYOR, &c., OF NEW YORK.

Municipal corporations — their liability for benefits received and accepted under an executed contract — interest.

The plaintiff was employed by the street commissioner of New York to perform certain services at a stipulated salary. He continued to perform such services from 1866 to 1872, when he was discharged. He was paid for his services, except the last three months of 1869; for these three months' salary this suit is brought. It is claimed that the finance department, by chapter 227 of Laws of 1863, had the sole power of appointing the plaintiff.

Held, that it must be assumed from the fact that the plaintiff's employment was continued for so long a period, and that he was paid from month to month till October, 1869, that the finance department acquiesced in his appointment and treated it as valid, if not regularly made, and must be deemed equivalent to an actual employment by that department.

An appropriation having been made at the beginning of the fiscal year in which this claim arose, out of which it could have been paid, the fact that this appropriation was exhausted is no defense to plaintiff's claim under a contract entered into with him at a time prior to its exhaustion.

No right of action exists against the city of New York until the lapse of thirty days after the presentation of the demand to the comptroller, as required by the statute. Interest, therefore, can only be allowed on a demand against the city from the lapse of thirty days after its presentation to the comptroller.

General Term, First Department, May, 1876.

Before DAVIS, *P. J.*, BRADY *and* DANIELS, *JJ.*

APPEAL from judgment on verdict directed by the court.

Elliot Sandford, for respondent.

The plaintiff was employed in 1866 as a lamp-lighter to light the gas lamps at Jefferson market, in the city of New York, and was to be paid monthly the sum of twenty-five dollars. He continued to be so employed till he was discharged by commissioner Van Nort in 1872. He has been paid for his services, except for the last three months of the year 1869, and has brought this action to recover the sum of seventy-five dollars. The proof shows that he was appointed by street commissioner Cornell.

By the charter of 1857 (*chapter* 446, *section* 23), the street department had cognizance of the lighting of streets, roads and places, and the care of public buildings, and there was created a bureau in that department denominated the bureau of lamps and gas.

By the revised ordinances, passed in 1866, it was enacted by the common council, as follows:

"Chapter 4, article 1. The street department shall have cognizance of * * * lighting streets, roads, places and avenues, * * * wharves and piers, * * * and care of the buildings, offices and rooms, and public yards of the corporation, the supplying * * * the public markets with fuel, printing, &c., and all other things necessary therefor, the doing and furnishing of all other necessary work, repairs and supplies not provided for in other departments.

"There shall be eight bureaus in the street department, viz.: * * *

"A bureau for lighting the public streets, roads, places, avenues, wharves, piers and markets, and for doing all work and procuring all supplies and fixtures necessary for that purpose, to be called the bureau of lamps and gas.

"Article 2, section 5. All contracts for work, material or supplies relating to any of the matter under the cognizance of the street department shall be made by the street commissioner."

Under this statute and the revised ordinance, plaintiff was

employed by the street commissioner, and continued to perform his work till 1872.

Verdict was directed for plaintiff, and defendants have appealed from the judgment.

First. At the trial, the plaintiff offered in evidence, as proof of a prior appropriation covering the expense of employing plaintiff, a resolution of the common council appropriating over $1,000,000 for purchasing and maintaining the public lamps in the streets and markets, passed by both boards May 17, 1869. It was objected to as invalid, having been adopted by both boards the same day. Section 37 of the charter, however, permitted this, if by unanimous consent. Having the power under certain conditions, it will be presumed that these conditions existed, rather than that these public officers violated the law. (In fact, the ordinance was passed by unanimous consent) (*Conway* agt. *The Mayor*, 4 *Hun*, 43, 47; *Arent* agt. *Squire*, 2 *Daly*, 347).

But if the resolution was invalid, an appropriation had been previously made by the legislature of the same amount for the same purpose, and the action of the common council was not necessary. This appropriation was made in the tax levy act, chapter 876, passed May 12, 1869, and the attention of the court was directed at the trial to this provision.

Second. Defendants moved to dismiss the complaint, on the ground that the street commissioner had no power to employ plaintiff, because control over markets had been conferred on the finance department. By section 27 of the charter of 1857, there was created an inspector's department, charged with cognizance of all matters affecting public health, and in this department a bureau was established for the inspection, regulation and management of the public markets, the chief officer of which shall be denominated "superintendent of markets." It would appear from the context that his duties pertained to the general subject of public health intrusted to the department in which his bureau was placed. In 1863, this bureau was transferred to the finance

department, by a clause in section 1 of chapter 227, Laws of 1863, which is as follows:

"The bureau for the inspection, regulation and management of the public markets of the city of New York, shall hereafter be in the finance department of said city, and all laws and ordinances now in force relative to the bureau of markets, or other officers thereof, shall apply to the said bureau as herein provided."

This was all the power the finance department had over markets when the plaintiff was employed, and during the time for which he claims compensation. It is not pretended that the city inspector's department had the power to employ lamp-lighters. It had cognizance of health matters only. It is immaterial whether one department having control of public buildings and lamps and gas, or another having power over city markets, employed plaintiff; for, employed by either department, he was an employe of the defendants — the city — and, as such, was paid for several years before and after the year 1869. It is well settled that a municipal body is as subject as private persons to liabilities for benefits received and accepted under an executed contract, although voidable or even void (*Harlem Gas-light Co.*, 3 *Robt.*, 100, 124, *and cases cited*).

But the care of public buildings, and the power over lamps and gas, and the lighting thereof, always remained, and still is, in the street department (*Harlem Gas-light Co.* agt. *The Mayor*, 33 *N. Y.*, 309, 313; 3 *Robt.*, 100).

Third. The answer set up as a defense that the necessity for the services alleged in the complaint was not certified by any department, but this defense was abandoned on the trial, and no objection was taken that plaintiff had failed to prove the existence of such a certificate. It was incumbent on the defendant, who set up the defense, to prove it (2 *Denio*, 609, 616; 2 *Hilton*, 297; *Dykers* agt. *Townsend*, 24 *N. Y.*, 57, 63).

In fact, such certificates were given each month, and

plaintiff was ready on the trial to prove it if called upon (*Leveridge* agt. *The Mayor, not reported*).

It was also alleged in the answer that no appropriation covering the expense of the alleged service was ever made, and then it was averred that on October 1, 1869, expenditures had been made and liabilities incurred equal to the whole sum of the appropriation, and that on the eighteenth day of October the appropriation was wholly expended. The proof showed affirmatively that there was an appropriation at the beginning of the fiscal year of over $1,000,000.

Fourth. The fact that this appropriation was exhausted was no defense to plaintiff's claim under a contract entered into with him at a time prior to its exhaustion, and the offer to prove the exhaustion was properly denied (*Lewis* agt. *The Mayor*, 6 *Hun*, 241; *Detwiler* agt. *The Mayor*, 1 *T. & C.*, 657; *Kingsland* agt. *The Mayor*, 5 *Daly*, 448; *Vanderpoel* agt. *The Mayor*, *not reported*).

The answer did not allege that when the contract was made there was no appropriation in the city treasury for such an expense (*Gas-light Co.* agt. *The Mayor*, 49 *How*, 227).

In this case, it appears that plaintiff was retained in his employment under a continuous contract, and that in May, 1869, there was a large appropriation.

The plaintiff having made a contract with defendants, which was valid and regular when made, it was incumbent on defendants to have provided money to pay when the services were rendered, and the legislature should have made an appropriation sufficient to meet the expense.

It nowhere in the case appears that the appropriation was squandered or diverted. There was not enough to satisfy the contract of this plaintiff.

"It is equally clear, says Mr. justice SWAYNE, that when a state has authorized a municipal corporation to contract and to exercise the power of local taxation to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation are

equally bound, and neither the state nor the corporation can any more impair the obligation of a contract in this way than in any other" (*Van Hoffman* agt. *The City of Quincey*, 4 *Wallace*, 535, 555; *Cooley Constitutional Limitations*, 285).

In the case of *Quin* agt. *The Mayor* (44 *Howard*, 266), it was held that the city was liable for plaintiff's salary, although the board of apportionment had failed to provide for its payment.

Fifth. Interest was computed on the seventy-five dollars from the 1st of January, 1870, and this was correct, for it is well settled that the rule, in respect to interest on debts against municipal corporations, does not differ from that which applies to individuals (*Dillon on Munic. Corp.*, *vol.* 1 [*2d ed.*], *sec.* 414).

The rule in regard to interest, in respect to accounts against towns, does not differ from that governing accounts against individuals (*Langdon* agt. *Castleton*, 30 *Vt.*, 154).

The interest is recoverable on a contract for the payment of money from the time when the principal ought to have been paid (*Van Rensselaer* agt. *Jewett*, 2 *N. Y.*, 135; *Dana* agt. *Fiedler*, 12 *N. Y.*, 40, 51; *Adams* agt. *The Fort Plain Bank*, 36 *N. Y.*, 255).

Chief justice SAVAGE says, in the case of *The People* agt. *The County of New York* (5 *Cowen*, 331), it being an action against the county to compel the defendants to pay the interest on arrears of taxes due to the state: "It will not surely be considered inequitable that whenever the debtor knows what he is to pay, and when to pay, he shall be charged with interest if he neglect to pay."

Sixth. The judgment below should be affirmed.

Chas. P. Miller, for appellant.

I. The street commissioner had no authority to appoint the plaintiff to light the lamps at Jefferson market.

1. By chapter 227 of the Laws of 1863, which was in force

in 1869 (*sec.* 1), it is provided: "That the bureau for the inspection, regulation and management of the public markets of the city of New York shall be hereafter in the finance department of said city; and all laws and ordinances now in force relative to the bureau of markets, or superintendent or other officers thereof, shall apply to said bureau as herein provided."

2. Unless there was authority vested in the chief of the bureau of markets to employ men to light the lamps in the markets, there could be no authority in any department or bureau to employ persons for that purpose.

The revised ordinances of 1866 (*chapter* 17, *page* 248) provide, specifically, that no person, unless authorized by the gas-light companies furnishing gas to the public lamps shall, at any time, light, or cause to be lighted, any public lamp which said companies are required to light under their several contracts with the mayor, &c.

In other words all the lamps in the public streets, avenues, roads and places were to be lighted by persons employed by the different gas-light companies; and if this ordinance did not apply to the lamps in the public markets, and if there were lamps in the public markets and the city was obliged to light them at its own expense, the proper officer to provide persons to light those lamps would be, necessarily, not the head of the street department who had no authority whatever over the markets but an officer of the bureau of markets.

II. The offer made by defendants' counsel to show that on the 18th of October, 1869, the appropriation made for lamps and gas was entirely exhausted was improperly excluded.

(*a.*) Chapter 876, of the Laws of 1869, the tax levy act referred to by plaintiff's counsel provides, section 11, page 2132, that: "Neither the corporation, the mayor, &c., of the city of New York, nor any board, department, officer or agent thereof, or head of department, shall incur any liability or make any contract or contracts, or permit or vote for, or authorize, audit or allow, directly or indirectly, any expendi-

ture for any of the objects and purposes specified, the aggregate of which expenditure and of the liabilities of such contracts shall exceed the sum appropriated for said purpose, or for any other purpose or object than that herein specified" (*See, also, sec.* 31 *of chap.* 446 *of the Laws of* 1857, *the charter; Donovan* agt. *The Mayor*, 33 *N. Y.*, 192; *Kingsland* agt. *The Mayor*, 5 *Daly*, 448).

III. The complaint should have been dismissed.

IV. The plaintiff, in any event, was only entitled to a judgment for the amount which would be due to him for the first eighteen days of October, at the rate of twenty-five dollars a month, with interest from the time that the demand was made upon the comptroller, as required by statute, for the settlement and adjustment of the claim upon which this action is founded, and the judgment should, in any event, be reduced to that amount (*Hook* agt. *The Mayor, &c., supreme court unreported manuscript opinion*).

DAVIS, *P. J.*— It appeared on the trial that the plaintiff was employed, in 1866, as a lamplighter to light the gas lamps at Jefferson market, and was to be paid monthly the sum of twenty-five dollars.

He continued to be so employed till he was discharged by the street commissioner in 1872. He was paid for his services, except for the last three months of the year 1869. If, as is claimed by the appellants, the power to appoint lighters of gas lamps for the market was vested in the finance department by chapter 227 of the Laws of 1863, yet it must be assumed, from the meagre facts appearing in this case, and from the fact that the plaintiff's employment was continued from 1866 to 1872, and that he was paid from month to month till October, 1869, that the finance department acquiesced in his appointment, and treated it as valid if not regularly made.

The acquiescence of the finance department and its action, in making payment for the services at a stipulated compen-

sation for so long a period, should be deemed equivalent to an actual employment by that department.

There was no offer to show that no appropriation had been made at the time the plaintiff was employed out of which he would be entitled to compensation.

An appropriation was, in fact, made in the year 1869, and out of which his compensation could have been paid, and the presumption must be, if that appropriation was exhausted on the 18th day of October, as offered to be shown, that the exhaustion was caused by subsequently accruing expenditure.

The offer was not broad enough to bring the case within the prohibiting section 11 of chapter 876 of the Laws of 1869, or of section 31 of chapter 446 of the Laws of 1857. We think the court did not, therefore, err in excluding the offer.

It was claimed, by defendant's counsel on the trial, that the plaintiff was not entitled to recover interest upon the amount due until a demand had first been made on the comptroller, as required by statute. In this case, it was averred in plaintiff's complaint that the claim had been presented to the comptroller of the city of New York, and that more than thirty days elapsed since such presentation to pay the same. We have held that no right of action exists against the city until the lapse of thirty days after the presentation of the demand to the comptroller as required by the statute, and that interest does not accrue until the obligation to pay arises (*Hook* agt. *Mayor, not reported*). The plaintiff should not, therefore, be allowed interest for the whole period since January, 1870, but only from the lapse of thirty days from the presentation of his demand to the comptroller. That point of time does not appear, except from the pleadings, and from the allegations in the pleadings, it can only be inferred that the suit was brought upon the expiration of such thirty days.

The summons was dated September 2, 1874, and on that

day the complaint appears to have been verified, and in the absence of any thing more definite to fix the time, interest should have been paid from that date. But the judge below, in passing upon the question, said that he would reduce the amount of interest if the defendant's counsel would present any authority on that question.

Under such circumstances we think it proper to direct such deduction to be made, and to affirm the judgment as so reduced, with costs of the appeal.

The plaintiff was entitled to judgment for seventy-five dollars, with interest from the 2d day of September, 1874, which amounts to six dollars and thirty-five cents.

Judgment modified so as to reduce it to that amount, and affirmed as modified, with costs of appeal.

SUPREME COURT.

HENRY J. FORWARD agt. EDWARD J. FRENCH.

Order of arrest — its proper execution — practice — rule 6.

An order of arrest, granted by one of the justices of Erie county, was directed to the sheriff of said county, requiring him to arrest the defendant and hold him to bail in a sum specified, and to return the order to plaintiff's attorneys within five days after the arrest. The sheriff made the arrest as required by the order; and, within the time limited, delivered the order to the plaintiff's attorneys, with his return indorsed, and a certified copy of the undertaking of the bail. A copy of Rule 6 was not indorsed upon the order. The original affidavits and order of arrest were filed in the proper clerk's office by the plaintiff's attorneys within ten days after the arrest.

Held, that the practice was strictly in conformity with the statute (*Code, secs.* 183, 184, 193) regulating the same.

Rule 6 of the general rules of practice of the supreme court, so far as it directs the sheriff to file the order with the clerk, seems to be in plain conflict with the terms of the order itself, which is in the form prescribed by statute (*Code, sec.* 183), and in conflict with the statute *Code, sec.*, 193), which directs the sheriff, within a time limited by the terms in the order, to deliver the order to the plaintiff or his attorney with his return indorsed thereon.

Erie Special Term, March 1876.

MOTION by defendant to vacate order of arrest, on the sole ground that Rule 6 of the general rules of practice of this court was not indorsed on the order before its delivery to the sheriff.

Day & Romer, for motion.

Martindale & Oliver, opposed.

Forward agt. French.

HENDERSON, *J.* — The order of arrest was granted by Mr. justice RUMSEY on the 23d of February, 1876. It was directed to the sheriff of Erie county, and required him to arrest the defendant and hold him to bail in a sum mentioned, and to return the order to Messrs. Martindale & Oliver, plaintiff's attorneys at Rochester, Monroe county, New York, within five days after the arrest of the defendant. The order was indorsed by plaintiff's attorneys.

The sheriff made the arrest as required by the order, and within the time limited for that purpose he delivered the order to the plaintiff's attorney, with his return indorsed, and a certified copy of the undertaking of the bail. A copy of Rule 6 was not indorsed upon the order. The original affidavits and order of arrest were filed in the proper clerk's office by the plaintiff's attorneys within ten days after the arrest.

Section 183 of the Code prescribes that the order shall require the sheriff forthwith to arrest the defendant and hold him to bail in a sum specified, and to return the order, at a time and place therein mentioned, to the plaintiff or attorney, by whom it shall be subscribed or indorsed. Section 184 makes it the duty of the sheriff, upon arresting the defendant, to deliver to him a copy of the order and a copy of the affidavit upon which it was granted. Section 193 requires the sheriff, within the time limited for that purpose by the terms of the order itself, to deliver the order to the plaintiff or his attorney, by whom it is subscribed with his return indorsed thereon.

By the provisions of the statute above referred to the form of the order and the duty of the sheriff receiving it for service are clearly and definitely pointed out. Rule 6 requires the sheriff to file the order with the clerk within ten days after the arrest, and that a copy of the rule shall be indorsed on the order before its delivery to the sheriff. This rule, so far as it directs the sheriff to file the order with the clerk, seems to be in plain conflict with the terms of the order itself, which

is in the form prescribed by statute (*Code, sec.* 183), and in conflict with the statute (*Code, sec.* 193), which directs the sheriff, within a time limited by the terms of the order, to deliver the order to the plaintiff or his attorney with his return indorsed thereon. Had this rule been indorsed on the order as required by the terms of the rule, it would, notwithstanding, have been the duty of the sheriff to have disregarded the rule and to have obeyed the statute by delivering the order to the plaintiff's attorneys at Rochester, Monroe county, New York, with his return indorsed, within five days after the arrest, instead of filing it in the clerk's office of Genesee county within ten days after the arrest as the rule requires.

I think the practice in this case was strictly in conformity with the statute regulating the same, and that the motion should be denied with seven dollars costs.

SUPREME COURT.

SCHIFF and another agt. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Common carriers — verbal agreement — not merged in bill of lading — power to limit their liability.

Where goods are shipped under a verbal agreement for their transportation, such agreement is not merged in a bill of lading, which is partly written and partly printed, delivered to the shipper after he has parted with the control of his goods, notwithstanding such bill of lading, by its terms, limits the liability of the carrier, and expresses, on its face, that by accepting it the shipper agrees to its conditions. The mere receipt of the bill, after the verbal agreement had been acted upon, is not sufficient to conclude him from showing what the actual agreement was, under which the goods had been shipped.

When the contract for transportation is over the lines of several distinct and independent companies, it is perfectly competent for those companies to limit their liability by contract as expressed in the bill of lading.

Where a bill of lading contained a provision in substance that no connecting carrier should be held liable for any loss or damage to goods, except what occurred on its own route, and it was shown, by proof, that the damage occurred after the defendants had delivered the goods safely, and in good time, order and condition to a connecting company or carrier, any right of action which may have accrued to the plaintiff does not exist against the defendants.

Special Term, April, 1876.

T. R. Shearman, for plaintiffs.

Frank Loomis, for defendants.

LAWRENCE, *J.* — The evidence appears to me to establish that the agreement, between the plaintiff Clarke and Cross,

representing the Red Line, was that the goods should be sent in a refrigerator car through to St. Louis.

Nor do I think that the plaintiffs were precluded, by the receipt of a bill of lading in which this provision was omitted, from insisting upon the agreement, as made verbally between Clarke and Cross. The evidence establishes that shortly after the young man Wardell came back to the plaintiffs' office, one of the plaintiffs saw Cross and asked him why "they did not put in the words 'refrigerator car through,' &c., and he (Cross) said he did not like to put that in; it did not make a particle of difference, the car would go through all right; they had telegraphed to have it go, and I need not worry a particle." Clarke further testifies that it was between five and six o'clock when they received the bill of lading and after the goods were shipped, and that it was too late to see anybody or to do any thing about it, because the train went out at half-past five o'clock. The verbal agreement was not, therefore, merged in the bill of lading (*See Bostwick* agt. *Balt. & Ohio R. R. Co.*, 45 *N. Y.*, 712).

The contract then being that the goods be sent in a refrigerator car through to St. Louis, the question is, are the defendants liable upon the facts proven, for the neglect or failure to transport the goods in such a car.

The contract was for transportation over the lines of several distinct and independent companies, and the bill of lading provides that the responsibility of these companies is to terminate on the delivery of the freight, as per this bill of lading, to the company whose line may be considered a part of the route to the place of destination of said goods or packages.

The Red Line, over which these goods were to be carried, being made of several different companies, it was perfectly competent for those companies to limit their liability by contract as expressed in the bill of lading (*Rickerts* agt. *B. & O. R. R. Co.*, 59 *N. Y.*, 637; *Belger* agt. *Dinsmore*, 51 *id.*, 166; *N. J., &c., Nav. Co.* agt. *Merchants' Bank*, 6 *How.*

[*U. S.*], 384; *Dow* agt. *N. J. S. Nav. Co.*, 1 *Ker.*, 485; *Nicholas* agt. *N. Y. C. and H. R. R. Co.*, 4 *Hun*, 329).

It is not pretended that the goods were not safely carried by the defendants over their route in a refrigerator car, nor that they were not delivered by the defendants to the Lake Shore and Michigan Southern Railroad Company, the next line, in good time and in good order and condition.

The court of appeals held, in *Rickerts* agt. *The Balt. and Ohio R. R. Co.* (59 *N. Y.*, 637), that where a bill of lading contained a provision, in substance, that no connecting carrier should be held liable for any loss or damage to goods except what occurred on its own route, the defendants were not more liable if the loss occurred on the route of any other railroad than that through whose negligence the injury arose.

I am, therefore, of the opinion, as the default alleged occurred upon one of the roads which took possession of the plaintiff's goods after the defendants had carried said goods over their own route safely and in good time, order and condition, and had delivered them to the next continuing line, any right of action which may have accrued to the plaintiffs does not exist against the defendants.

I have examined the numerous cases cited by the learned counsel for the plaintiffs in his elaborate brief, but more of them appear to me to decide that under such a bill of lading as I have had under consideration in this case, a company which has safely transferred goods delivered to it over its own route and transferred them to the next continuing line is liable for any injuries which may happen the goods at a subsequent period in their transportation.

There must, therefore, be judgment dismissing the complaint with costs to the defendants.

Findings may be settled on two days' notice.

SUPREME COURT.

In re SHERMAN P. BARBOUR.

Marine court—jurisdiction.

The marine court has jurisdiction of actions where the amount recovered does not exceed $2,000. It does not matter what is the amount claimed, if the sum finally recovered does not exceed $2,000, exclusive of costs.

Special Term, December, 1876.

WRITS of *habeas corpus* and certiorari were issued by a justice of this court upon petition showing detention of relator by virtue of an order to arrest and hold to bail in $3,000, made by the chief justice of the marine court of the city of New York. The record produced was the summons for relief, complaint and answer, affidavit, and order to arrest. The action was for $2,500 damages for deceit, and the complaint demanded judgment for $2,500. The relator insisted that the marine court exceeded its jurisdiction in entertaining this action in that the claim should not be for more than $2,000, which should appear on the face of the record.

Charles H. Smith, for relator, cited *Frees* agt. *Ford* (6 *N. Y.*, 176); *People ex rel. Brownson* agt. *Marine Court* (36 *Barb.*, 341).

N. Reeve, opposed.

BRADY, *J.*—The jurisdiction of the marine court in the action against the relator cannot be disputed. Its exercise has been lawful, and therefore in accord with the power conferring it. It matters not what is the amount claimed, if the sum finally recovered does not exceed $2,000, exclusive of costs (*Chap.* 479, *Laws* 1875). If the recovery were in the action against the relator in excess of the sum named, interest and costs, another order to hold to bail detained the defendant on basis of the judgment, it might be a proper subject of investigation. The relator assigns no lawful reason for his discharge, and the writs must, therefore, be dismissed.

N. Y. COMMON PLEAS.

Day agt. Lee.

Supplementary proceedings — examination of third persons.

Where a creditor seeks to compel a third person to appear and be examined under section 294 of the Code, as to whether he has any property belonging to the judgment debtor, his affidavit must be positive, not on information and belief. It must present the question whether the third person had such property in his possession and not merely the belief of the attorney or creditor on the point.

Special Term, November, 1876.

An application was made to punish Mr. Jones, the publisher of the New York Times, for alleged contempt in not appearing to be examined as a third person under section 294 of the Code, as to whether he had any property of the defendant Lee, a judgment debtor. The application was made by Albert Day, the creditor, in person. He had examined Lee in supplementary proceedings, and ascertained that he was or had been an employe of the Times on a weekly salary. Mr. Day thereupon made affidavit that he was informed and believed that Mr. Jones had property of the debtor to the amount of over $10, and obtained an order requiring Mr. Jones to appear and be examined. It appeared in the case that there was in fact nothing due to the judgment debtor at the time the order was served on Mr. Jones.

Mr. Day, in person, for the application.

Mr. Abbott, opposed.

VAN BRUNT, *J.*— The affidavit upon which the order was made, the allegation of indebtedness being simply upon information and belief without stating the sources of information, is not a sufficient allegation to support any facts necessary to be established to entitle the court to issue the order for examination, and the examination in this case shows the necessity of the rule requiring facts to be stated, and not conclusions. Many cases have come before me where third parties have been damaged before the court without any reason whatever, and such orders are a hardship and should be discountenanced.

Proceedings dismissed as without jurisdiction.

SUPREME COURT.

GEORGE L. MARVIN and WIFE agt. LE GRAND MARVIN *et al.*

Partition — motion to set aside a judgment in partition, and for a new partition restoring equality in the original partition, which has been lost, by failure of the title of the ancestress — proper remedy in such case.

In case of a compulsory partition between tenants in common, and the failure of title to a portion of the land partitioned by a defect in the common title, and eviction from such portion, the party so evicted has a right to be compensated for the loss occasioned by the eviction out of the other lands, and perhaps, in case of a failure of the other lands, by reason of alienation by the copartitioners, leaving the remaining partitioned lands insufficient, to a pecuniary compensation from the proceeds of the alienated lands, which may result in a personal decree.

It seems that in a case where the partition was recent, and no change had occurred by which the value of the lands partitioned was materially affected, and there was no other claims or equities between the parties which ought to be examined or adjusted, the proper remedy might be by a motion to set aside the judgment in partition, and to have a new partition restoring equality of partition, in view of the new facts.

A final judgment in partition is not more exempt from the interference and controlling of courts of equity than are final judgments and decrees in other cases. Hence, such a mistake of facts, or such an accident as would authorize a court of equity, in enjoining or setting aside an ordinary judgment, would justify setting aside or correcting a judgment or decree in partition. And, in a proper case, where no extrinsic circumstances were to be considered, a remedy by motion might be adopted.

But where the judgment in partition was entered more than ten years ago, and the parties then entered into the possession and the pernancy of the rents, issues and profits of the various premises to them respectively set off in severalty, the partition involving many distinct parcels, differently situated and of different values, and many parcels of the land divided were subject to known incumbrances, the partition being a long and intricate proceeding, and involving, to a great extent, the

judgment and discretion of the commissioners, one of whom has since died, and it is claimed by the copartitioner, though denied by the plaintiff, that all the land which was set off to him has passed beyond his possession or control by foreclosures of previous incumbrances and by various alienations:

Held, that these facts afford a sufficient reason for denying summary relief by a motion in the original partition suit, and show that the various questions likely to arise should be presented and passed upon in a more formal manner, especially where the rights of third parties appear to have intervened, and their titles are to be brought in question.

It seems that the proper remedy in such case is by a new action, in the nature of a bill of review, and, in such a suit, the further alienation of the property partitioned to the copartitioner might, if necessary, be restrained by a notice of *lis pendens*, or an injunction order, and after examining and disposing of all questions, whether of fact or law, bearing upon the equitable rights of the parties, a decree might be made for a repartition, if the situation of the premises should be such as to render that course practicable without injustice; if not, then such other equitable relief might be given as the situation of the parties and property might seem to require.

Erie, Special Term, November, 1876.

TALCOTT, *J.* — The plaintiff in this case, which is an action for the partition of divers parcels of real estate in the city of Buffalo, descended to George L. Marvin and Le Grand Marvin, as heirs at law of Sarah L. Marvin, deceased, move upon affidavits. The substance of the motion of the plaintiffs is to set aside the judgment in partition in this case; to open the proceedings, and refer the case back to the commissioners, or the two of them who still survive, with an appointment, by the court, of a new commissioner in place of George R. Babcock, esq., one of the former commissioners, now recently deceased, to the end that the action of the commissioners on the former commission may be reviewed and re-examined, and equality of partition be restored by a new partition. The foundation of the motion is, that since the original partition was made, and since the judgment was entered, the title of the ancestress to a certain parcel of land, alleged to be of the value of about $12,000, and which, in the original

partition, was partitioned and set off to the plaintiff George L. Marvin, has failed, and that the plaintiff, by reason of such failure of the title of the ancestress, and under and by virtue of a judgment of a special term of this court, affirmed by the general term, has surrendered and been evicted from the title and possession of the said parcel, part of the descended estate.

The fundamental ground of this motion presents a question which, so far as I have been able to discover, is entirely novel in this state.

At the common law no compulsory partition could be enforced, except in the case of coparceners, which was when the ancestor died seized of an estate of inheritance, and left no male descendants, but only female issue, in which case the land descended to the females in equal degree as "coparceners," each being seized of an equal share, by a tenancy, the substantial equivalent of what is now known as tenancy in common; and at the common law partition could be compelled between such coparceners by the ancient writ *de partitione facienda*, and it resulted from the fact that such partition was compulsory; that at common law, and upon principles manifestly equitable and just, upon a compulsory partition in such a case, a warranty from each coparcener to the other was attached or implied. In fact, under the common law, that coparcener who was deprived of her purparty, the share set off to her, by the failure of the ancestor's title, or any part thereof, might re-enter upon the lands set off to her sister, and thus annul and set aside the whole partition, or might "deraign the warranty paramount;" that is, call upon her coparceners to assist her in vouching the warrantor of the ancestor as to the premises adversely claimed, and if this failed to produce restitution, have compensation from the other lands which had been set off to her coparceners by the partition. And much curious and abstruse learning was, by the ancient common law, devoted to partition between coparceners and its incidents and consequences. A careful review of the

common law relating to this subject may be found in *Allnatt on Partition* (5 *Law Lib.*, *see p.* 156, *etc.*); and see *Rawle on Covenants*, 473, 474, 475, 477; and *Freeman on Cotenancy and Partition* (*secs.* 533, 534). In the thirty-first year of the reign of Henry VIII (*chap.* 1), was passed an act of parliament, whereby the right of compulsory partition was, for the first time, extended to joint tenants and tenants in common, and by that act it was enacted as follows: "Provided, always, and be it enacted, that every of the said joint tenants, or tenants in common, and their heirs, after such partition made, shall and may have the aid of the other, or their heirs, to the intent to deraign the warranty paramount, and to recover, for the rate as is used between coparceners after partition made by order of the common law, any thing in this act to the contrary notwithstanding."

This, though a mere statutory provision, was a recognition of the principle of the common law, that a warranty attached to a compulsory partition, though the condition by which the original partition might be altogether avoided by that cotenant who had been deprived of his share by title paramount was not enacted, and so in England it was held that the condition of avoiding the partition by re-entry in case of the successful establishment of an adverse title paramount did not exist in the case of joint tenants, or tenants in common.

The just and equitable rule, that one tenant in common, who has been evicted from the share set off to him by a compulsory partition, may have eqitable compensation from his cotenant whose share still remains to him, where the eviction was in consequence of a failure of a portion of the title which was partitioned, seems to have been considered or adopted as a part of the common law brought with them by the colonists of this country, and has been recognized and enforced in many of the states as applicable to tenancies in common (*Rawle on Covenants*, 477), and sometimes without recognizing the fact that the right, so far as tenants in common are concerned, was conferred by the statute of Henry VIII.

Thus, in *Heather* agt. *Strohocker* (3 *Pen. & Watts*, 505), it was held that every partition implies not only a warranty at the election of the party, but a condition entire, the breach of which gives an entry into the whole. And in *Dugan* agt. *Hollins et al.* (4 *Maryland Chy.*, 139, *op.* 147), it is stated that, "at common law it is well settled that, upon a partition between coparceners, there is an implied warranty that if either loses any of his share by eviction on account of defect in the title of the ancestor, the party evicted may enter upon the others and defeat the partition, or by proper proceedings may obtain recompense for the part lost;" and this was assumed to be the law applicable to tenants in common. In fact, by the abrogation of the rights conferred by *primogeniture*, the estate of heirs at law in this country is, in substance, analogous to the estate of coparceners at the common law.

Where estates descended to all the children equally, there is no substantial difference between coparceners and tenants in common, and the technical distinction between coparceny and estates in common may be considered as essentially extinguished in the United States (4 *Kent*, 367).

In *Walker* agt. *Hall* (15 *Ohio*, 355), which was a decree in a proceeding originally commenced for the assignment of dower, it was decreed that the copartitioners should recompense Mrs. Hall, one of the partitioners, for her loss of the equal proportion of the estate. And in *Sawyer* agt. *Cator* (8 *Humphreys*, 256), it was held that there is an implied warranty between the parties to a compulsory partition, and in case of eviction by paramount title, a right to have compensation from each other for the loss sustained.

I am, therefore, of the opinion that in case of a compulsory partition between tenants in common and the failure of title to a portion of the land partitioned by a defect in the common title and eviction from such portion, the party so evicted has a right to be compensated for the loss occasioned by the eviction, out of the other lands; and perhaps in case of a failure of the other lands by reason of alienation by the

copartitioners leaving the remaining partitioned lands insufficient, to a pecuniary compensation from the proceeds of the alienated lands, which may result in a personal decree. Probably in a case where the partition was recent, and no change had occurred by which the value of the lands partitioned was materially affected, and there were no other claims or equities between the parties which ought to be examined or adjusted, the proper remedy might be by a motion to set aside the judgment in partition, and to have a new partition, restoring equality of partition in view of the new facts, as in the case of *Bridges* agt. *Howard* (*briefly reported and without any reasons in* 18 *Iowa*, 116). In that case the partition was made in 1863. A mortgage of the ancestor on part of the premises to the school fund commissioner, was afterwards discovered. This mortgage was foreclosed, and the land sold in October, 1863. The copartitioner, whose title had been defeated by the foreclosure, petitioned, at the March term, 1864, to set the partition aside and have a new partition made. And this was ordered. It did not appear, nor was it claimed, that the title or circumstances had, in any manner, changed; and, so far as appears, nothing was involved except the mere question whether the judgment in partition could be set aside for the purpose of restoring equality of partition, where one of the copartitioners had been evicted by title paramount, from a portion of the premises held under the common title.

A final judgment in partition is not more exempt from the interference and controlling of courts of equity than are final judgments and decrees in other cases. Hence, such a mistake of facts, or such an accident as would authorize a court of equity in enjoining or setting aside an ordinary judgment, would justify setting aside or correcting a judgment or decree in partition (*Freeman on Cotenancy and Partition, sec.* 534). And in a proper case, where no extrinsic circumstances were to be considered, doubtless a remedy by motion might be adopted. But in the case now at bar there seems to be various

objections to this summary mode of relief. The judgment in partition was entered more than ten years ago, and the parties then entered into the possession and the pernancy of the rents, issues and profits of the various premises to them respectively set off in severalty.

The partition involved many distinct parcels of land, differently situated and of different values, and many parcels of the land divided were subject to known incumbrances. The commissioners were authorized, by the commission appointing them, to cause surveys to be made of the several parcels, and were required, in making the partition, to have regard to the liens and incumbrances thereon by taxes, tax sales and mortgages, which were set forth in the report of the referee, and were also required and directed, in making said partition, to have regard to the leases of certain portions of the property which were made by the mother of the copartitioners in her lifetime, and which were particularly described in the report of the said referee. The partition was a long and intricate proceeding, and involved, to a great extent, the judgment and discretion of the commissioners, one of whom is now dead.

The defendant Le Grand Marvin seems to claim, in his opposing affidavits, that the failure of the title to the land from which George has been evicted, was caused by the improper conduct of George himself. That, in fact, he was not evicted, and did not surrender the premises by force of or in consequence of the judgment of the supreme court, but that the surrender was under and by virtue of a compromise, involving various other considerations, out of which he claims that certain equities resulted to him, Le Grand, which should be considered in arriving at the measure of a just compensation for the land lost. And finally, as I understand the somewhat obscure expressions contained in his affidavits, he claims that all the land which was set off to him has passed beyond his possession, or control — portions by foreclosures of the previous incumbrances, and the residue by various alienations.

The plaintiff was understood to claim, that the statement of Le Grand with regard to the fact that the property has passed beyond his control, is untrue, and to insist that the whole, or some portions of the property so claimed to have been alienated, are, in fact, held upon some trust for the benefit of Le Grand himself. All these facts, I think, afford a sufficient reason for denying summary relief by a motion in the original partition suit, and show that the various questions likely to arise should be presented and passed upon in a more formal manner, especially if the rights of third parties appear to have intervened, and their titles are to be brought in question. It seems to me that an action, somewhat in the nature of a bill of review, would be the proper remedy. In such a suit the further alienation of the property partitioned to Le Grand might, if necessary, be restrained by a notice of *lis pendens*, or an injunction order. In the case of *Dugan* agt. *Hollins* (*supra*), which was a suit in equity, and some property remained to be distributed, the court ordered that no further distribution should be made until payment of the sum equitably required to equalize the partition. And in the case of *Sawyers* agt. *Cator* (*cited above from* 8 *Humphreys*), the court says, in substance: "The remedy is by bill in chancery, either by setting aside the partition as being founded in mistake, if it can be done without injustice, and if not, then by a decree of pecuniary compensation." The case was a bill in equity, filed for contribution to restore equality after an eviction. An action would be essentially in the nature of a bill of review, and after examining and disposing of all questions, whether of fact or law, bearing upon the equitable rights of the parties, a decree might be made for a repartition, if the situation of the premises should be such as to render that course practicable without injustice; if not, then such other equitable relief might be given as the situation of the parties and property might seem to require (*see Dacres* agt. *Gorges*, 2 *Sims. & Stew.*, 455).

Entertaining the view, therefore, that the plaintiff probably

has an equitable right to recompense for the property he has lost by reason of the paramount title, I am of the opinion that, at all events, in this case, the remedy is to be sought not by motion in the partition suit, but by a new action. The motion must, therefore, be denied, without prejudice to any action to be hereafter instituted to obtain relief in the premises. As it is a new question, no costs are allowed to either party on the motion.

The order to be entered is:

Motion denied without costs to either party, and without prejudice to any suit to be instituted by the plaintiff, or either of them, or their heirs, to obtain relief in consequence of a failure of title to a part of the land set off to the plaintiff, or one of them by partition, in this suit.

The Mayor agt. The Forty-second and Grand Street R. R. Co.

SUPREME COURT.

THE MAYOR, &c., OF NEW YORK agt. THE FORTY-SECOND AND GRAND STREET R. R. Co.

City railroads — their liability to pay a license fee — complaint.

By an ordinance of the common council, duly enacted and passed the 31st day of December, 1858, it is required, that each and every passenger railroad car running in the city of New York, below One Hundred and Twenty-fifth street, shall pay a license fee of fifty dollars, except the small one-horse cars, which shall each pay twenty-five dollars annually as such license. The defendant has operated and controlled its railroad, by virtue of an act of the legislature passed April 17th, 1860 (*Laws of* 1860, *chap.* 515), the second section of which provides, that "said railroad * * * shall be subject to such reasonable rules and regulations in respect thereto, as the common council of the city of New York may, from time to time, by ordinance prescribe, *and to the payment to the city of the same license fee annually for each car run thereon, as is now paid by other city railroads in said city.*"

Held, that the liability of defendants does not depend upon the fact that the other railroads have *actually paid* their license fee into the city treasury, but upon the fact that they were required and legally liable to pay such fees; that the statute should be interpreted as if it read "and to the payment to the city of the same license fee annually for each car run thereon as is now *required* to be paid by other railroads in said city."

Although there is no distinct averment in the complaint that the other railroads in the city of New York, at the times mentioned in the complaint, were *actually* paying to the city the amount prescribed by the ordinance alleged in the complaint, or any sum whatever, it is not for this reason defective.

It is perfectly competent for the legislature to validate an invalid ordinance, and, although there seems to be some doubt as to the power of the common council to pass such an ordinance as that of 1858, it being an ordinance for revenue purposes only and not for police and internal government, still, the legislature, by the act of 1860, under which the

defendants acquired their right to run cars through the streets, recognized the validity of the ordinance of 1858.

Special Term, June, 1876.

Mr. Clarkson, for plaintiff.

Mr. Ely, for defendant.

LAWRENCE, *J.*—The complaint, in my opinion, states a cause of action against the defendant.

It is alleged that by an ordinance of the common council duly enacted and passed on the 31st day of December, 1858, it is required, that each and every passenger railroad car running in the city of New York, below One Hundred and Twenty-fifth street, shall pay into the city treasury a license fee of fifty dollars, except the small one-horse cars, which shall each pay twenty-five dollars annually as such license. It is averred that this ordinance continued in force up to the 18th of March, 1875, when another ordinance was passed. The provisions of this last ordinance it will not be necessary to consider in disposing of this case, as the claim stated in the complaint arises wholly under the ordinance of 1858, and the act of 1860 hereinafter referred to. The complaint further alleges that the defendant is a corporation existing under the laws of the state of New York, and that by virtue of the provisions of the act (*chap.* 515 *of the Laws of* 1860) entitled "An act to authorize the construction of a railroad on Tenth avenue, Forty-second street, and certain other avenues and streets of the city of New York," passed April 17, 1860, the defendant has operated and controlled the railroad known as the Forty-second Street and Grand Street Ferry Railroad, occupying certain streets and avenues in the city of New York below One Hundred and Twenty-fifth street, and is the proprietor of a large number of passenger cars running daily thereon. It is then averred that the defendants, upon occupying the said streets and avenues, and running cars thereon, as per-

mitted by and in accordance with the terms of the act above referred to, became liable to the payment of a license fee to the plaintiffs of fifty dollars upon each car so run; and after stating that during certain specified years the defendant ran a specified number of cars, it is again alleged that the defendant is the proprietor of the said cars and thereby has become indebted to the plaintiffs in the sum of fifty dollars annually for each car run, amounting in the aggregate to the sum of $36,000. Demand of the payment of such fees and the refusal of the defendant to make such payment are also alleged. To this complaint a demurrer is interposed on the ground that it does not state facts sufficient to constitute a cause of action.

The act of 1860, under which the defendant, by its demurrer, admits that it has been engaged in running the cars referred to in the complaint, by its second section provides that "said railroad * * * shall be subject to such reasonable rules and regulations in respect thereto as the common council of the city of New York may from time to time by ordinance prescribe, *and to the payment to the city of the same license fee annually for each car run thereon as is now paid by other city railroads in said city*" (*Laws of* 1860, *p.* 1051).

There is no distinct averment in the complaint that the other railroads in the city of New York, at the times mentioned in the complaint, were *actually* paying to the city the amounts prescribed by the ordinance, alleged in the complaint, or any sums whatever, and the defendant claims, if I correctly apprehend the argument of counsel, that for this reason the complaint is defective.

This position I do not regard as tenable. The complaint shows that by an ordinance of the common council it was, at the times referred to, required that each and every passenger railroad car should pay the annual license fee which, it is alleged, that the defendant has neglected to pay.

It is not alleged that the cars of the defendant were the

small, one-horse cars, but that they were passenger cars. There is, therefore, no uncertainty as to the cars which are intended by the pleader, nor can it be said that there is any doubt, after reading the complaint, as to the branch of the ordinance upon which the plaintiffs rest their claim.

If the ordinance was valid the liability of the defendant does not depend upon the fact that the other railroads have *actually paid* their license fees into the city treasury, but upon the fact that they were required and legally liable to pay such fees.

The object of the statute was to put this railroad on the same footing as the other railroads, and the legislature must, I think, be presumed to have had the ordinance of 1858 in contemplation at the time of the enactment of the statute. It surely cannot be supposed that the legislature intended that the liability of this railroad to pay license fees should be dependent upon the fact of the *actual payment* of such fees by the other railroads. If such be the true construction of the act, it necessarily follows that any railroad, by neglecting or refusing to pay its license fees, could, by its illegal act, exempt all the other railroads in the city from such liability. Such a construction of the statute seems to me to be unreasonable and forced, and I am convinced that it will be more in unison with the true principles of construction to interpret the statute as if it read: "And to the payment to the city of the same license fee annually, for each car run thereon, as is now *required* to be paid by other railroads in said city."

I have discussed this question, so far, on the assumption that the ordinance of 1858 was a valid ordinance, and one which it was perfectly competent for the common council to ordain. Upon the argument I did not understand the learned counsel for the defendant as attacking the validity of the ordinance, or as questioning the power of the common council to pass it; and yet, at the hearing, I was strongly inclined to the opinion that the decision of the Court of Appeals in the case of *The Mayor, &c.*, agt. *The Second Avenue Railroad* (32 *N. Y.*, 261), determined that the ordinance was absolutely

null and void, as not being within the powers delegated to the common council. Upon examining that decision I find, however, that is based, in a great measure, upon the fact that the city had granted to the assignors of the company the right to run their cars through certain streets and avenues without receiving any license fee therefor, and that the subsequent attempt by the city to impose a license fee upon the company was in violation of its contract, and that, therefore, the ordinance, as to that company, was void. It is true, that Judge BROWN, in delivering the opinion of the court, very strongly questions the right of the city to pass such an ordinance, on the ground that it was to be construed as an ordinance for revenue purposes only, and not for police and internal government; but I think a careful reading of the opinion will show that the decision mainly proceeds on the theory that the ordinance was in violation of the contract made between the city and the assignors of the defendant (*see* 32 *N. Y., p.* 272).

In any event, the effect of the act of 1860 was not discussed or involved in the decision of that case, and it is, therefore, not very material whether I am right in my interpretation of that decision. It was perfectly competent for the legislature to validate an invalid ordinance. It is not suggested that there was any law or ordinance, at the time the act of 1860 was passed, requiring the payment of license fees for railroad cars other than the ordinance of 1858.

If, therefore, the conclusion is sound, that the legislature must be presumed to have had the provisions of the ordinance of 1858 in contemplation at the time the act of 1860 was passed, the act amounts to a legislative recognition of the validity of the ordinance, and the defendant having acquired the right to run cars through the streets wholly from that act, is not in a position to attack or question the ordinance.

There must be judgment for the plaintiffs overruling the demurrer, with leave, however, to the defendant to answer within twenty days upon payment of costs.

SUPREME COURT.

THE RHODE ISLAND HORSESHOE COMPANY agt. THE GOODENOUGH HORSESHOE MANUFACTURING COMPANY.

Removal of cause to United States court — where petition and bond should be filed.

The petition and bond required to be given for the removal of a cause from a state court to the United States circuit court, under the act of congress of 1875 authorizing such removal where litigants reside in different states, must be filed in the supreme court and not in the office of the county clerk.

Although the county clerk of New York county is *ex officio* the clerk of the supreme court, his office is not the supreme court, and the filing of the petition and bond with him will not work a removal.

At Chambers, October, 1876.

THE plaintiff sued to recover $13,259.35 for horseshoes, &c., claimed to have been sold to the defendants, and judgment was entered for this sum. The defendants moved to vacate the judgment on the ground that it was entered after the removal of the case to the United States circuit court, under the act of congress of 1875, authorizing such removal where litigants reside in different states. The defendant, on the third of October, filed its petition and bond with the county clerk, and it was claimed that the plaintiff disregarded the removal and entered judgment.

The following affidavit was used by plaintiff to resist the motion to vacate the judgment:

"CITY AND COUNTY OF NEW YORK, *ss.:*

"Alfred Taylor, an attorney of this court, assistant and managing clerk in the office of Tracy, Olmstead & Tracy, plaintiff's attorneys, being sworn, says that he has inquired of Mr. Hardie, law clerk in the office of the county clerk, and is informed by him, and believes that the petition and bond in this action were filed on the third day of October instant, in the county clerk's office, in the basement of the court-house, between 12 M. and 1 P. M.; and the same were brought there by some person from without, who was not a clerk, deputy clerk, or officer of the court, who handed the same to him at his desk in said office without making any explanation or request; and he thereupon indorsed the same, 'Filed October 3, 1876,' and placed the same on file in that office.

"Deponent further says, that this court was in session on said October third, and one judge was holding the special term at chambers, and another was holding the special term for trials, and other judges were holding the general term, and two or more circuits, and the several terms of the court for October had commenced the day previous; and that there then was and now is a clerk's office and clerk of the special term, at chambers, in the first story of the court-house, adjoining the court room of said special term at chambers; and each other branch of the court has its own clerk; and that no papers for the removal of the cause, nor any notice thereof, were received by the plaintiff's attorneys, except the written notice, of which a copy is hereto annexed, and marked schedule A, until after the entry of judgment and issue of execution and readjustment of costs on notice, which latter took place October ninth, and that the summons and complaint, and copy of bond as security for costs, were served September 14, 1876, and the judgment was entered October 5, 1876; and that, as deponent is informed and believes, neither the petition nor bond was presented to or brought before this court, or any judge thereof, for acceptance or any

other purpose; and that deponent has this day examined the petition and bond, and does not find thereon any mark or entry of acceptance or approval on either of the same.

"Subscribed and sworn to October 23, 1876.

"ALFRED TAYLOR."

"SCHEDULE A.

"Please to take notice, that we have been retained by and appear as attorneys for the Goodenough Horseshoe Manufacturing Company, the defendant in the action above entitled, and that the said defendant has this day made and filed in said action in the said supreme court, in the office of the clerk of the city and county of New York, at the county court-house in said city, a petition and bond for the removal of said action from said court to the circuit court of the United States for the southern district of New York, in the second circuit.

"Dated NEW YORK CITY, *October* 3, 1876.

"STARR & RUGGLES,

"*Attorneys for the Goodenough H. M. Co.*"

Charles Tracy, for plaintiff.

Henry M. Ruggles, for defendant.

BARRETT, *J.* — The petition and bond should have been filed in the supreme court, and not in the office of the county clerk. The county clerk is ex officio the clerk of the supreme court in this county, but his office is not the supreme court. Then the court has a duty to perform, viz., to accept the petition and bond and proceed no further in the suit. This duty cannot be performed by the county clerk; the statute imposes it upon the court. Further, the bond must be with "good and sufficient surety." It is such a bond, and such a bond only, that the court is required to accept. It is for the court, and not for the clerk, to accept a bond with good and

sufficient surety. This construction is the only reasonable one. In this county there is no vacation such as would prevent a party from presenting his petition and bond to the court. The special term is in session every day in the year, except Sundays and legal holidays. It would be contrary to precedent, and subversive of the orderly administration of justice, to permit any serious step in a cause without notice to the party to be affected. The act should be read in the light of this just principle. Then consider the effect of the opposite construction. The claim here is that the mere filing of the petition and bond in the clerk's office, without notice to the plaintiff (that given him being a mere act of courtesy), worked a removal, and this, although the court was in session at the time. In other words, that a plaintiff who brings a suit in our courts may, in complete ignorance of the removal, proceed to judgment and execution only to find himself a trespasser. If congress meant this, the language should have been so precise and specific that no other construction could possibly be put upon it. The motion must be denied, with ten dollars costs.

SUPREME COURT.

THADDEUS HYATT *et al.* agt. JOHN ROACH.

Reference to enforce a penal obligation cannot be ordered.

A reference cannot be ordered, although a long account is involved, where the action is against a trustee of a corporation organized under the "manufacturing and mining law" of 1848, upon his liability under section 12 of that law, for the failure of the corporation to file its annual report.

Such an action is not upon contract but is brought to recover a penalty. A compulsory reference cannot be ordered, although a long account is involved, where the action is brought to enforce a penal obligation.

New York Special Term, November, 1876.

DEFENDANT was sued on his liability as trustee of a corporation, under section 12 of the "manufacturing and mining law" (*chap.* 40, *Laws of* 1848).

It was admitted, by the answer, that defendant was such trustee, and that no report has been filed, as required by said section.

The defense is a general denial.

Plaintiff moved for a compulsory reference, on the pleadings, and on an affidavit that the debt incurred by the corporation was for labor and materials, and that the proof would involve a long account of more than thirty items.

Ambrose Monell, for plaintiffs and motion.

Geo. W. Van Siclen, for defendant and opposed.

LAWRENCE, *J.* — The action is brought to recover a penalty for neglect to file the annual report under the twelfth section

of chapter forty (*Laws of* 1848). It is not upon contract (*Merchants' Bank* agt. *Bliss*, 35 *N. Y.*, 412). The penalty imposed by that section is, that upon failure to file such report the trustees of the company shall, jointly and severally, be liable for all the debts of the company then existing, &c.

The character of the action is determined by the complaint (*Welsh* agt. *Darragh*, 52 *N. Y.*, 590). An inspection of the complaint shows that it is not upon contract, but is brought to enforce a penal obligation of the defendant, under the statute, in his capacity as trustee.

Motion for reference denied, with costs.

N. Y. SUPERIOR COURT.

WILLIAM SMITH agt. ROBERT MACDONALD.

Subpœna duces tecum—in proceedings for examination of defendant as a party before trial.

It is well settled that a party examined as a witness, either at or before the trial, may be required, upon a *subpœna duces tecum*, to produce his *books* or *papers* relating to or containing evidence pertinent to the issues in the action.

There is no discrepancy between the provisions of sections 390, 391 of the Code, which authorize compulsory examination of a party as a witness, at the instance of the adverse party before trial, and the privilege accorded by section 388, under which, in certain cases, an inspection and copy of books and papers containing evidence relating to the suit may be obtained through the order of the court, or a justice thereof, in their discretion, and it would be unreasonable and unjust to withhold the process of *subpœna duces tecum* merely because a *discovery* is also allowed under certain special circumstances.

Special Term, January, 1876.

MOTION to set aside *subpœna duces tecum*, issued on the examination of defendant as a witness before trial pursuant to sections 390 and 391 of the Code.

This motion was argued on an order for the plaintiff to show cause why the "*subpœna duces tecum*," previously served on the defendant, should not be set aside and vacated, with costs. The plaintiff's proceedings were for an examination of the defendant as a party before trial, pursuant to sections 390 and 391 of the Code. The defendant had been served previously with the notice, order, and summons for his examination, together with the *subpœna duces tecum*, and

the affidavit of plaintiff's attorney, on which the order and summons had been obtained, stating that the examination of the defendant was necessary before the plaintiff could safely proceed to trial, and stating in what respect such examination was necessary.

M. M. Budlong, for plaintiff.

Blumenstiel & Ascher, for defendants.

SANFORD, *J.* — The defendant contends that the only mode in which his adversary can, before trial secure evidence contained in the books of account kept by him, or in documents of which he has the exclusive possession, is by an application for discovery under section 388 of the Code, and according to the requirements of the supreme court rules, 18, 19 and 20. In other words, that the plain and express provisions of sections 390 and 391, which authorize compulsory examination of a party as a witness at the instance of the adverse party before trial in the same manner and subject to the same rules of examination as any other witness, must be rejected as repugnant to or inconsistent with the privilege accorded by section 388, under which, in certain cases, an inspection and copy of books and papers containing evidence relating to the suit may be obtained through the order of the court, or a judge or justice thereof, in their discretion.

It is a settled rule of construction that if there be a discrepancy between the statutes, or different parts of the same statute, such an exposition of them should be made as will enable both to operate and have effect. But I think there is no discrepancy between the two sections of the Code which prescribe the remedies now in question. The purpose to be attained by one is entirely different from that contemplated by the other, and both may be properly pursued in the same cause either concurrently or at different stages of the litigation, as the exigencies of the case may require.

The books or papers, of which an inspection or copy is procured under section 388, do not thereby become evidence in the case. The party producing them may not, by virtue of their production, use these as evidence in his own favor, and he at whose instance they are produced, must, upon the trial, if he would put them in evidence, resort to the same process and be subject to the same rule, with respect to their production and admissibility, as if no such discovery had been made. But if called for and produced, under *subpœna duces tecum*, they may be resorted to in the examination of any person as a witness, whether a party or not, and whether he be examined at the trial or previously, and it would be unreasonable and unjust to withhold that process merely because a discovery is also allowed under certain special circumstances. But a *subpœna duces tecum* may not be used as the means of obtaining a discovery, and the party calling for the production of books and papers, and the preliminary examination of a party, or other witnesses before trial, will be required to pursue the examination, with respect to their contents, in the same manner and subject to the same rules as if the trial were actually proceeding in court.

I am aware that there is some conflict of decisions in the different courts on the question, but the conclusion at which I have arrived is amply sustained not only by the informal direction of judge SEDGWICK, already made in the case at bar (to which I should unhesitatingly defer even were my own views in conflict with his), but by repeated adjudications of the appeal branch of this court, to which authority I am to submit (*Valiente* agt. *Dyckman*, 24 *How. Pr. R.*, 222; *Central National Bank* agt. *Arthur*, 2 *Sweeney*, 194; *Central National Bank* agt. *White*, 37 *Superior Ct. R.*, 297).

This motion must be denied, with costs.

COURT OF APPEALS.

IN RE ASSESSMENT UPON PROPERTY OF WILLIAM T. BLODGETT AND OTHERS FOR LEWIS STREET IN THE CITY OF NEW YORK.

Assessments for sewers in city of New York, when void.

By the act of April 12, 1865 (*Laws of* 1865), the construction of any sewer or drain in the city of New York is absolutely prohibited, unless such sewer or drain shall be in accordance with a general plan devised by the Croton board for the sewerage of the particular district in which such sewer or drain is proposed to be constructed.

An assessment for a sewer contracted for before such a general plan has been devised, is void.

It seems, that the provisions of section 4 of the act as to the filing of the copies of maps and plans in the different offices designated by that section, has been held to be directory only (*See Matter of The N. Y. Prot. E. Public School*, 47 *N. Y.*, 556).

October Term, 1870.

GROVER, *J.* — By section 1, chapter 381, Laws of 1865, power is given to the Croton board of the city of New York to devise a plan of sewerage and drainage of the city. Section 2 required the board to lay out the city into as many sewerage districts as they deem necessary, and to determine and show, on suitable maps or plans, the location, course, size, and grade of each sewer and drain proposed for each of said districts, and also to show on the maps or plans the contemplated depth of the sewers and drains below the surface and established grades of the streets.

Section 4 provides that, upon the completion of the maps and plans, they shall be the permanent plans for the sewerage

of such district, subject to such alterations as may become necessary in consequence of alterations made in the grade of the streets, or otherwise, and that copies of such maps and plans shall be filed by the board in the offices of the common council, the comptroller, street commissioner, and city inspector.

Section 5 authorizes the board, upon the completion of the plans of sewerage of any district, and the filing of copies thereof as required by the preceding section, to invite proposals, and to contract for the whole, or any part of the work, in the district. The subsequent sections of the act provide, among other things, for reimbursing the city for the expense of the construction of the sewers and drains by assessing the same upon the property benefited thereby.

From the preceding sections it is manifest that before the board is authorized to contract for the performance of any work, it must devise a plan for the sewerage and drainage of the district. This requires deliberation, and the exercise of judgment by the board. This is important to the owner of property liable to assessment, as the expense to be incurred will be materially affected by the plan adopted. This was not done in the present case. The plan formed and map made by the engineer, who was also a member of the board, was not a compliance with the act in this respect. The other members of the board should have deliberated with him, and the district was entitled to the exercise of the judgment of the board after such deliberation had. It does not appear in the present case that any thing of this kind was done by the board until after the work for which the assessment was made was contracted for and performed, but rather, the contrary. Advertising for proposals for doing the work, pursuant to the plan prepared by a single member, cannot be regarded as the devising of such plan by the board.

There was an entire absence of deliberation and exercise of judgment by the board. When a statute confers power upon a board or officer to take the property of another, or create a

charge thereon, all the substantial requirements of the statute must be strictly complied with (*Sharp* agt. *Spier*, 4 *Hill*, 76).

This was not done in the present case. It is unnecessary to consider whether the filing of the copies, as required by the act, is not also essential to the power of the board to incur the expenditure in performing the work and make the same chargeable upon the land to be benefited.

The act of 1858 (*chap.* 338), was intended to provide an expeditious mode for determining the validity of assessments for local improvements in the city of New York, and for canceling the same when invalid either for fraud or illegal irregularity.

In the present case no fraud was alleged or proved, but there was legal irregularity in making the expenditure before the devising of the plan by the board, as required by the statute.

While we may regret the necessity of casting upon the municipality this expenditure, which the statute designed should be paid by the property benefited thereby, the law will not permit us to do otherwise.

The order of the general term, affirming that of the special term canceling the assessment, must be affirmed, with costs.

NOTE.—The foregoing opinion, although rendered some time since, not having been reported but now and then cited (*see* 46 *N. Y.*, 180; 47 *N. Y.*, 566, *and* 8 *Hun*, 459), seems to be of sufficient importance to the profession on the question of assessments for sewers in the city of New York to warrant us in giving it place.—[REP.

N. Y. COMMON PLEAS.

THE READY ROOFING COMPANY OF NEW YORK agt. OTIS K. CHAMBERLIN.

District courts — jurisdiction lost by failure of the justice to render judgment within the time limited by statute.

By the district court act, a justice is required to render his judgment, if a jury trial is not demanded, within eight days from the time the same is submitted to him for that purpose, except where the defendant is under arrest; in such case he must render his judgment immediately after the close of the trial.

If the last day falls on *Sunday* the judgment must be rendered on the day preceding, *i. e.*, the seventh day or *Saturday*.

General Term, November, 1876.

Before DALY, *C. J.*, VAN BRUNT *and* VAN HOESEN, *JJ.*

THE action was brought in the first district court, before Mr. justice CALLAGHAN, to recover the value of wine which the plaintiff claims to have sold to the defendant. The defense was that he, the defendant, received the wine from one Ridgway, in payment of rent of rooms which were leased to Ridgway in defendant's house, supposing that Ridgway owned the wine, as he gave defendant to understand, and that defendant had settled with Ridgway on that basis, and given him a receipt in full. It appears that Ridgway was all the time in the employ of the company. A further defense was, that plaintiff, whose business was to put roofs on houses, had no license to sell liquors under the excise law of the state of New York, and had not paid the internal revenue tax to the

United States, as the law requires. And the last defense, and the one on which the judgment of the district court seems to have been reversed, was that the justice had lost jurisdiction of the case at the time of rendering his decision.

M. M. Budlong, for appellant.

The judgment should, however, be reversed for the following reason:

By the return it appears that the case was tried and submitted on *June* 10, 1876, and that judgment was rendered on *June* 19, 1876.

The statute provides as follows: "Upon the issue of a fact joined, if a jury trial be not demanded as required by this act, the justice must hear the evidence and decide all questions of fact and law, and render judgment accordingly, within eight (8) days from the time the same is submitted to him for that purpose, except where the defendant is under arrest and has not given security for his appearance; in such case the justice must render his judgment immediately after the close of the trial."

The justice having failed to render his decision within the time limited by the law, lost jurisdiction of the case, and could render no valid judgment thereafter (*Berrian* agt. *Olmstead*, 4 *E. D. Smith*, 279; *Wiseman* agt. *The Pa: R. R. Co.*, 1 *Hilt.*, 300; *Bloomer* agt. *Merrill*, 1 *Daly*, 485; *Watson* agt. *Davis*, 19 *Wend.*, 371).

If the last day falls on Sunday (as was the case in the suit at bar), the judgment must be rendered on the day preceding.

See *Ex parte Dodge* (7 *Cowen*, 147), where the court held that "where the statute declares that an act shall be done within a certain number of days, Sunday must be reckoned as one, though it happens to be the last."

See, also, *Bissell* agt. *Bissell* (11 *Barb.*, 96). The court said, "Sunday is always counted as one of the days when the statute has declared that an act shall be performed within a

given number of days." Judge GRIDLEY shows, in the opinion, the difference between matters of practice and the construction of statutes in regard to computing time, and shows where a statute requires an act to be done within a given time, Sunday is to be included."

See, also, 2 *Cowen's Treatise* (*sec.* 1552, *5th ed.*), where it is laid down, "the days within which a justice shall render judgment are to be computed as excluding the first day; and if the fourth (now eighth) day fall on Sunday, *judgment must be rendered the day preceding*" (*see, also, Thayer* agt. *Felt*, 4 *Mass. R.*, 354). Section 407 of the Code refers only to the time within which an act is to be done as provided for in the Code. The statute fixing the time within which a justice is to render his decision is a separate one, and forms no part of the Code (*see the section in the Code*).

The judgment should be reversed.

F. J. Mather, for respondent.

BY THE COURT. — The justice rendered his judgment on the ninth day after the case was submitted to him for decision, the eighth day being Sunday. He lost jurisdiction, as under such circumstances his judgment should have been rendered on the seventh day or Saturday (2 *Cowen's Treat.*, *sec.* 1552, *and cases cited*).

The Code (*sec.* 407) does not apply. The limitation as to time in which the judgment is to be rendered is not enacted in the Code, but in the district court act.

The judgment must be reversed.

SUPREME COURT.

MARY L. WILSON agt. JAMES M. HARVEY *et al.*

Attachment against property of non-residents — when motion to vacate will be granted.

By the Code an attachment can only be issued in an action arising on contract for the recovery of money only, or in an action for the wrongful conversion of personal property.

This action is brought against the infant defendants and their general guardian. The infants and their general guardian are non-residents and the plaintiff is a sister of the infants' mother. Three causes of action are stated in the complaint: 1st. For boarding and maintaining the infants. 2d. For maintaining and taking care of their mother after the death of their father. And 3d. For legal expenses incurred in protecting the interests of the infants in certain real and personal estate to which they were entitled as heirs and next of kin of a deceased relative.

Held, that this action cannot be regarded as an action arising on contract for the recovery of money only, and an attachment cannot be allowed. Even if the infant defendants could be held liable on an implied contract for the matters set forth in the first and third causes of action stated in the complaint, on the ground that the board, raiment and supplies, &c., furnished and the moneys advanced and expended by the plaintiff were necessaries, the second cause of action cannot be sustained as arising on any contract, express or implied, of the infants. If the children could have been made liable to support their mother as an indigent and infirm person, upon the facts stated in the complaint (which seems doubtful), such liability would rest wholly upon the statute (1 *R. S.*, 604, *sec.* 1) and could only be enforced in the mode there directed. The law does not imply a promise from the child to pay for necessaries furnished, without his request, to an indigent parent, therefore the second cause of action stated in the complaint does not arise on contract for the recovery of money only.

Held also, that the joinder of a cause of action for which an attachment cannot issue, if standing alone, pursuant to the provisions of the Code, with one for which it might be issued, precludes the issuing of an attachment or is ground for vacating the same.

Wilson agt. Harvey.

Special Term, October, 1875.

Motion to vacate attachment.

Mr. Lovejoy, for motion.

Mr. Tallmadge, opposed.

Lawrence, *J.* — The action is brought against the infant defendants and their general guardian, and the prayer for relief in the complaint is, that it may be adjudged that the plaintiff recover the sum of $1,500, with interest, for the support and maintenance of said infants, as in said complaint mentioned; also, the further sum of $1,500, with interest, for the support and maintenance, medical and other care of the infants' late mother, Rachel D. Harvey, as in the complaint set forth; and also the sum of $750 for legal expenses incurred by the plaintiff, as in the complaint stated; and that it may be further adjudged that the said several sums be paid out of the estate of said infants now in the hands of their said general guardian, or which he may have under his control or in his possession, or with the surrogate of the county of New York, and that said guardian may be directed to make such payment, &c., and that the plaintiff may have such other or further relief, &c.

The infants and their general guardian are residents of the state of Illinois, and the plaintiff is a sister of the infants' mother.

Three causes of action are stated in the complaint, one for boarding and maintaining the infants, another for maintaining and taking care of their mother after the death of their father; and the third is for legal expenses incurred in protecting the interests of the infants in certain real and personal estate to which they were entitled as heirs and next of kin of a deceased relative.

An attachment has been issued against the defendants as

non-residents, and the complaint is referred to in the affidavit on which the attachment was issued, and it is made a part of said affidavit.

The property sought to be held under the attachment consists of moneys arising from the sale of the real estate above referred to under a judgment in an action brought for a partition, and of the moneys which the plaintiff claims to have saved for the infants by the legal proceedings above mentioned.

These moneys are in the hands of the surrogate and of the referee in the partition case, or in the trust company in which the referee was directed to deposit the same by the judgment in the partition suit.

Without discussing all the questions which were discussed upon the motion, there is a short answer, as it seems to me, to the claim of the plaintiff's counsel, that the attachment should be upheld. The Code only permits the issuing of an attachment in an action arising on contract for the recovery of money only, or in an action for the wrongful conversion of personal property. I do not see how this action can be regarded as an action arising on contract for the recovery of money only. Even if the infant defendants can be held liable on an implied contract for the matters set forth in the first and third causes of action stated in the complaint, on the ground that the board, raiment and supplies, &c., furnished, and the moneys advanced and expended by the plaintiff were necessaries, the second cause of action cannot be sustained as arising on any contract, express or implied, of the infants. Admitting that the children could have been made liable to support their mother, as an indigent and infirm person, upon the facts stated in the complaint, which may well be denied, such liability would have rested wholly upon the statute (1 *R. S.*, 614, *sec.* 1), and could only be enforced in the mode there directed.

Edwards agt. *Davies* (16 *Johns.*, 281). It was held in this case, which arose under the Revised Laws of 1813 (*p.* 286,

sec. 21), that the law does not imply a promise from the child to pay for necessaries furnished, without his request, to an indigent parent.

The provisions of the Revised Laws of 1813 are substantially the same as those of the Revised Statutes in regard to the liability of the child to support an indigent parent. It is quite obvious, therefore, that the second cause of action, stated in the complaint, does not arise on contract for the recovery of money only, and that the action is not for the recovery of money only (*Code, sec.* 227).

This is decisive of the motion, but there is another point to which I ought to allude. As one of the causes of action is an alleged claim for which an attachment could not issue, if standing alone; the attachment, it seems to me, cannot be supported even if it be conceded that the other causes of action are such as would authorize the issuing of an attachment against the property of non-residents. I cannot distinguish the case of an order of arrest from the case of an attachment. If the joinder of a cause of action for which the defendant cannot be arrested with one for which he can be, precludes the issuing of an order of arrest, or is ground for vacating such order if it has been issued, the same result must follow where an attachment has been sought for or granted in a case where one of the causes of action is one for which an attachment cannot issue pursuant to the provisions of the Code.

As to to the effect of such joinder in cases of arrest see *Lambert* agt. *Snow* (17 *How.*, 519); *McGovern* agt. *Payn* (32 *Barb.*, 84, 90 *and* 91).

Motion granted, with costs.

SUPREME COURT.

MILES STRICKLAND agt. CHARLES E. HEUGER *et al.*

County judge—his power to grant a stay of proceedings.

A county judge has power and is authorized to grant chamber orders.

A judge at chambers has no power to make an absolute, indefinite and continuing order, either to set aside or stay proceedings.

The plaintiff had served a complaint, and a motion had been made by defendants to have it made more definite, &c., and an order allowing plaintiff to amend his complaint was entered by the Jefferson June special term; the plaintiff, availing himself of the order, served an amended complaint on September 9, 1876. The order of June special term gave defendants forty days after such amended complaint was served, to answer. October seventeenth, on notice of motion and affidavits, an order was granted by a county judge which reads, viz.: "On the foregoing affidavits and notice of motion, ordered, that the time for defendants to serve answer or demur in this action be extended twenty days *from date*, and all proceedings on the part of plaintiff be stayed accordingly."

Held, that the order of October seventeenth, granted by the county judge, was authorized and valid.

Jefferson Special Term, November, 1876.

MOTION by the plaintiff to set aside an order granted by judge SAWYER (1), "for the reason the same is unauthorized, and grants a positive stay for twenty days; (2), and that the same be vacated and set aside, with costs, or for such other or further relief as the court may see fit to grant."

The defendants suggest that the motion is made without service by plaintiff of the affidavit on which the county judge granted the order. But the papers submitted show what affidavits and notice of motion were before judge

SAWYER when he granted the order objected to by plaintiff.

N. Whitney, for motion.

Williams & McFarlen, opposed.

HARDIN, *J.* — The plaintiff had served a complaint, and the defendants made a motion to have it made more definite, &c. That motion was heard at the Jefferson June special term, and resulted in an order allowing the plaintiff to amend his complaint. Availing of that order, the plaintiff served an amended complaint, and it appears by a memorandum on it that such service was made September 9, 1876. The order of June special term gave the defendants forty days after such amended complaint was served to answer.

The defendants, October 17, 1876, prepared a notice of motion and affidavits to set aside the amended complaint, and an affidavit of merits, and applied to judge SAWYER for an order, which he granted. That order is the subject of this motion. It reads, viz.: "On the foregoing affidavits and notice of motion, ordered, that the time for the defendants to serve answer or demur in this action be extended twenty days *from date*, and all proceedings on the part of plaintiff be stayed accordingly.

"Dated *October* 17, 1876.

(Signed) "O. H. SAWYER,

"*Judge of Jefferson county.*"

When this order was made the forty days had not expired given by the June special term order, and the order was therefore made while the defendants were not in default.

It extended the time "twenty days from *date*," and was, therefore, within the power of a judge at chambers; and it granted a stay "accordingly," which, of course, was limited by the twenty days. It was by a judge authorized to grant chamber orders (*Rule* 30, *sec.* 401, *sub.* 6, *of Code*).

The judge having power to grant the order, it follows that it cannot be vacated or set aside as unauthorized.

This motion is not put upon any irregularity specified, and, therefore, any irregularity is not brought up (*Rule* 46).

The order could not operate to create a stay of proceedings beyond twenty days, and therefore the case of *Mills* agt. *Thursby* (11 *How.*, 114) does not apply.

If the stay had been indefinite the same would not have been good (*Bk. of G.* agt. *Spencer*, 15 *How.*, 15). That case is reported 15 *How.*, 416, and the opinion of justice GREEN was put upon the ground that the proceedings there were not governed by ordinary rules applicable in actions, but rather to the rules applicable to special proceedings.

The order of 17th October, 1876, granted by judge SAWYER, must be held to have been authorized and valid.

The motion to set aside is denied, with ten dollars costs.

N. Y. COMMON PLEAS.

Hannah Greenthal agt. Frederick Schneider.

Agreement — executory contract for sale and delivery of personal property — remedy of vendee where article furnished is not according to contract.

Where the contract for the sale and delivery of goods, wares and merchandise is executory and there is no express warranty, the vendee must examine the article furnished as soon after he has accepted the same as practicable; and in case it does not correspond with the contract he must immediately return or offer to return it to the vendor, or at least notify him of the defects; and if he fails so to do he will be presumed to have accepted it in full performance of the contract, and waives any claim for damages he may have by reason of the breach.

Where, upon a sale of a large quantity of butter, it was shown upon the part of the defendant that when the plaintiff first offered the butter for sale he stated that it was "good, excellent butter."

Held, that this statement was merely descriptive of the quality of the article proposed to be sold, but not amounting to a warranty.

Held, also, that even if an express warranty could be predicated upon the representations made respecting the butter, it would, in this case, only go to the extent that the article itself was of a particular kind or quality, and not that it was fit and suitable for the use to which the defendant applied it.

General Term, November, 1875.

Before Daly, *Ch. J.*, Loew *and* J. F. Daly, *JJ.*

Appeal from a judgment of the seventh district court, entered on the verdict of a jury.

This action was brought to recover the contract-price of a large quantity of butter sold and delivered by the plaintiff to the defendant. The latter, who is by occupation a cake baker,

among other defenses set up a breach of contract and a breach of warranty. He claimed that the butter delivered to him was of such an inferior quality as to spoil the cakes on the several occasions when he used it in their composition, by reason of which he sustained damages to the amount of $250.

On the trial it was shown, on the part of the defendant, that when the plaintiff first offered the butter for sale, he stated that it was "good, excellent butter."

The jury found a verdict in favor of the plaintiff for the full amount claimed. The defendant appealed to this court.

David Levy, for defendant, appellant.

Townsend & Levinger, for plaintiff, respondent.

LOEW, *J.* — Where the contract for the sale and delivery of goods, wares and merchandise is executory and there is no express warranty, the vendee must examine the article furnished as soon after he has accepted the same as practicable, and in case it does not correspond with the contract he must immediately return or offer to return it to the vendor, or at least notify him of the defects; and if he fails to do so he will be presumed to have accepted it in full performance of the contract, and waives any claim for damages he may have by reason of the breach (*Reed* agt. *Randall*, 29 *N. Y.*, 358).

In the case at bar the statements which the defendant claims were made by the plaintiff were merely descriptive of the quality of the article he proposed to sell, and cannot fairly be considered as amounting to a warranty. It was, therefore, incumbent on the defendant to inspect the butter and ascertain its quality or condition as soon after receiving the same as opportunity offered. This he failed to do. On the contrary it appears, from his own testimony, that he kept it some ten days before he examined it, and that he subsequently used a great portion of it in his business before he notified the plaintiff and offered to return the residue. Under these

circumstances the defendant could not recoup or counter-claim the damages which he claims to have sustained by reason of the inferior quality of the butter.

But even if an express warranty could be predicated upon the representations made respecting the butter, it would, in this case, only go to the extent that the article itself was of a particular kind or quality, and not that it was fit and suitable for the use to which the defendant applied it (*Milburn* agt. *Belloni*, 34 *Barb.*, 607). There is nothing in the evidence to show that the defendant as much as informed the plaintiff that the butter was to be used for a special purpose. The only damages that the defendant could therefore, in any event, recoup, would be the difference between the value of the article as it was and its value if it had been as represented, and on this point no evidence was given.

The judgment should be affirmed, with costs.

DALY, Ch. J., and J. F. DALY, J., concurred.

SUPREME COURT.

THE CENTRAL NATIONAL BANK agt. THE RICHLAND NATIONAL BANK OF MANSFIELD.

Attachments against national banks or their property,

An attachment cannot be issued against a national bank or its property before final judgment in *any suit*, action or proceeding in *any state*, county or municipal court.

The issuing of an attachment against these institutions or their property is strictly prohibited by congress, and it is only where jurisdiction cannot be acquired without resort to attachment that the power of congress to inhibit, or rather to postpone, the use until final judgment of such provisional remedy, seems to be at all questionable.

This prohibition does not in any manner interfere with the general *jurisdiction* of the state courts over national banks. It does not take away the jurisdiction over such foreign corporations having property within this state. That jurisdiction is not acquired by virtue of the provisions of the Code of Procedure relating to this particular provisional remedy; the jurisdiction is acquired by the service of the summons, and that is effected under the provisions of section 134 of the Code; or where personal service cannot be had upon an officer, then it may be had by publication under the provisions of section 135.

Special Term, November, 1876.

BOTH the plaintiff and the defendant are corporations deriving their existence and attributes from the acts of congress known as the national bank acts.

This is a motion to vacate an attachment granted in violation of section 5242 of the Revised Statutes of the United States recently enacted. The provision is as follows: "No attachment, injunction, or execution shall be issued against

such association or its property before final judgment in any suit, action or proceeding in any state, county or municipal court."

The plaintiff, itself a national bank, in violation of this provision, on August 29, 1876, sued out a warrant of attachment against the defendant, a national bank located at Mansfield, Ohio, and has attached defendant's balance in the Fourth National Bank of this city by serving the usual notice, &c. No judgment has yet been entered in this action.

C. A. Davison, for plaintiff.

B. F. Lee, for defendant.

BARRETT, *J.* — An attachment is not always essential to the acquisition of jurisdiction in a suit against a foreign corporation. Such jurisdiction is acquired in several ways. 1. In all cases by the personal service of the summons, within this state, upon its president, secretary or treasurer. 2. If the cause of action arose in this state, by such service upon (in addition to the three officers named) any other of the corporation, its cashier, or a director, or managing agent thereof; 3. By such service upon any one of such persons when the corporation has property within this state; 4. By the publication of the summons in either one of two cases — (*a*) when the cause of action has arisen in this state; (*b*) when the corporation has property within this state (*Code, secs.* 134, 135).

These provisions are apparently decisive of this motion, because it is only where jurisdiction cannot be acquired without resort to an attachment that the power of congress to inhibit, or rather to postpone, the use until final judgment of such a provisional remedy seems to be at all questionable.

The court of appeals did not deny this power in *Cooke* agt. *The State National Bank of Boston* (52 *N. Y.*, 96). It merely decided that it is not competent for congress to deprive the state courts of jurisdiction in all actions against national

banks, nor to restrict such jurisdiction to the federal courts. The supreme court of the United States, however, in *The Farmers and Mechanics' Bank of Buffalo* agt. *Dearing* (*MS.*) asserted a power in congress wide enough to deprive us of all jurisdiction over such corporations. "The states can exercise no control over them," says Mr. justice SWAYNE, "nor in any wise affect their operation, except in so far as congress may see proper to permit." Be that as it may, the decisions are unanimous as to the power to relieve national banks from the garnishee process (101 *Mass.*, 240; 40 *Md.*, 269; 11 *Blatch.*, 102). "The power to create," as was said in *The Farmers and M. N. Bank of Buffalo* agt. *Dearing* (*ubi sup.*), "carries with it the power to preserve;" and if congress is of the opinion that the usefulness of these institutions is likely to be impaired by the tying up of their funds in distant states, pending a litigation, protection therefrom is a reasonable exercise of such power to preserve.

This was conceded in *Southwick* agt. *The National Bank of Memphis* (7 *Hun*, 96). The question in that case was whether the power had been exercised by section 57 of the act of 1864, as amended by section 2 of chapter 269 of the laws of congress of 1873; and it was held, owing to the peculiar and somewhat obscure phraseology of the act, that the intention was merely to inhibit attachments against such corporations when located within our own jurisdiction. All question as to the intention of congress, however, was set at rest by the Revised Statutes of 1874, sections 5242, 5198, as corrected in the appendix. As if to meet the construction thus placed upon the words "such action or proceedings" in the connection in which they are found in the amendment of 1873, the prohibitory clause is removed from its old connection and transferred to section 5242, in which no particular class of suits is previously designated. Then the word "such" is omitted, and now the provision reads as follows: "No attachment, injunction or execution shall be issued against any such association or its property before final judgment in

any suit, action or proceeding in any state, county or municipal court."

This clearly meets the suggestion of the presiding justice in the *Southwick Case*, that the prohibition "is not extended to any suit, action or proceeding, but to any such suit, action or proceeding."

It is peculiarly fitting that the plaintiff, itself a national bank, should submit, in matters of detail intended for the common benefit of such institutions, to the will of the law-making power under which it was created and is operated.

There is nothing in rule 34 which can affect the result. Formerly that rule required proof, where the summons had been served by publication, of the issuing of an attachment, &c.

It may be a question whether this did not require more in actions against foreign corporations than did sections 134 and 135 of the Code above cited, and whether in such cases, and to that extent, the rule was not in conflict with such actions.

But, at all events, the rule has been amended, and, as it now reads, such proof is only required "if the case be one in which an attachment may be issued." This, as we have seen, is not such a case.

The motion to vacate the attachment must, therefore, be granted, with ten dollars costs.

SUPREME COURT.

THE PEOPLE, &c., *ex rel.* GEORGE W. CARLETON agt. THE BOARD OF ASSESSORS OF THE CITY OF NEW YORK.

Closing of Bloomingdale road — application for mandamus — effect of affidavits upon knowledge and denials in affidavits.

Positive allegations in moving affidavits are not put in issue by denials upon or for want of information in answering affidavits.

The board of assessors of the city of New York is authorized and directed to estimate the damage sustained by owners of property by reason of the closing of streets and roads by the Central Park Commissioners.

Upon an application for a mandamus, if the substantial allegations in the moving affidavits are not fully met or avoided in the answering affidavits, a peremptory writ should be granted in the first instance.

General Term, First Department, January, 1876.

Before DAVIS, *P. J.*, DANIELS *and* BRADY, *JJ.*

THE relator is the owner of premises fronting on Bloomingdale road, between One Hundred and One Hundred and First streets in the city of New York, which road was closed by the Central park commissioners under chapter 697 of the Laws 1867. The board of assessors having refused to allow him the damages sustained by such closing, application was made for a peremptory writ of mandamus to compel the board to act. The special term granted the application, and from that order this appeal is taken.

William C. Whitney, counsel to the corporation, and *I. A. Beall*, for appellants.

James A. Deering, for respondent

DANIELS, *J.* — By chapter 697 of the Laws of 1867, the board of commissioners of the Central park were empowered to lay out and close streets, avenues, roads and public squares or places within a particularly designated and described district of the city of New York, adjacent to and surrounding the park. This district included territory forming part of what was called the Bloomingdale road upon which the applicant claimed that he owned property which was injured by the action of the commissioners in closing that road. He swore positively to his title to the property, and his statements upon that subject were not otherwise denied than by an answer of the board, verified by one of its members, denying knowledge or information sufficient to form a belief whether such statements were true. That form of denial for the purpose of meeting the averments of a positive affidavit upon a special motion, really amounts to nothing. The Code has allowed it in an answer or reply in forming issues of fact by way of pleading, but it has not been sanctioned or allowed for any other purpose. The applicant's affidavit may very well be literally true, and, at the same time, the person verifying the answer may have had no knowledge or information whatever upon the subject. For that reason the answer does not tend to discredit the statements made in the affidavit, and it must therefore be taken to be presumptively correct as to the applicant's title.

His affidavit is not so positive as to the existence of the Bloomingdale road in front of his premises. The statements are made upon his information and belief, that it was laid out over 100 years ago, and that it was afterward kept open and continued as a public highway of the city of New York, to and including the year 1867. But the uncertainty of this statement was so far fortified by legislative acts, recognizing the existence of the road, as to render it entirely worthy of reliance. Both together left no doubt as to that fact (*Laws* 1864, *pp.* 942, 943; *Laws of* 1838, *chap.* 223, *sec.* 3). How it first became a public road does not clearly appear in this case, but

that it was one when the act of 1867 was passed, seems to be reasonably free from substantial dispute, and that is was closed by the action of the Central park commissioners so far as it passed the applicant's premises was admitted by the assessors.

The applicant stated positively in his affidavit that closing the road had depreciated the value of his premises, and the answer of the assessors was that neither of them had any knowledge or information sufficient to form a belief that such was the fact. This denial, as already stated, in no way impaired the effect of the applicant's positive statement as to the fact. As matter of mere evidence, the circumstance that one person does not know or is not informed concerning a fact positively affirmed by another, is too slight in its effect to present even a conflict between their statements. It has been allowed in pleading to create an issue upon matters not in a condition to be conceded as true, but not by way of proof for the purpose of discrediting direct and positive evidence.

The facts established were sufficient to render it reasonably probable that the applicant had a well-founded claim for some compensation for damages created by the closing of the road, and that was sufficient to entitle him to have a hearing before the board of assessors.

The act of 1867 provides that damages shall be awarded to persons whose property may be injured by the commissioners' action under it in closing streets, avenues or roads (*Laws of* 1867, 1750), and that they shall be ascertained and paid in the manner specified by sections 3 and 4 of an act passed in 1852 (*Laws of* 1852, *p.* 47, *chap.* 52, *secs.* 3, 4).

It was not necessary to entitle the applicant to a hearing that it should be conclusively shown in the first instance that an award must be made in his favor by the board of assessors. A presumptive case was enough to secure the success of his application for the writ. Upon the hearing he may wholly or partially fail to support his claim. If he should, the board has complete authority so to decide. Its duty is to hear the case as it may be presented. If it shall not be satis-

factorily sustained by the proof he may offer, then it will be equally its duty to reject or reduce it, as the case made may seem to require. He was entitled to have the claim, made by him, heard by the board. That was erroneously denied when it was applied for, and the order made should be affirmed with ten dollars costs besides disbursements.

DAVIS, P. J., and BRADY, J., concurred.

SUPREME COURT.

REDICK MCKEE agt. RICHARD CHENEY.

Contract for lobby services—for personal influence with members of the legislature or other official body, illegal and void.

A contract for lobby services, for personal influence, for mere importunity, to members of the legislature or other official body, for bribery or corruption or for seducing or influencing them, by any other arguments, persuasions or inducements than such as bear directly and legitimately upon the merits of the pending application, is *illegal* and against public policy and *void*.

It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results.

Where the defendant's claim required the passage of an act of congress before it could be paid, the plaintiff, in substance, agreeing to collect that claim, and as a part of the service to be performed by him agreed to procure the passage of an act of congress, also agreed to importune and solicit, and in fact did importune and solicit, various members of the house of representatives; that he brought not only his personal influence to bear upon such members to secure the passage of the act, but also brought the personal influence of others to bear upon them to that end and for that purpose:

Held, that the claim was *void* as against public policy.

Held, also, that although the plaintiff sues upon an agreement made after the passage of the act of congress was procured, the consideration of the agreement, or a part of the consideration, was the service rendered by the plaintiff in procuring the passage of the act. The previous agreement as to those services being void as against public policy, the execution of a new agreement or a subsequent promise to pay for such services does not better the plaintiff's position.

Special Term, March, 1876.

Mr. Smith, for plaintiff.

Mr. Salmon, for defendant.

LAWRENCE, *J.* — In *Lyon* agt. *Mitchell* (36 *N. Y.*, 241), Mr. justice HUNT, in delivering the opinion of the court, after reviewing many of the cases relied upon by counsel in this action, uses the following language:

"A distinction may also well be made upon those cases which, I think, will dispose of the present question. Personal solicitation of legislators or of judges, is not a lawful subject of contract. Personal solicitation of the president, the governor or the heads of departments, for favors or for clemency, is not the lawful subject of contract. The apprehension that considerations, other than a high sense of duty and of the public interest, may thus be brought to influence their determination forbids this employment."

But a different principle prevails where property is offered for sale to the government and where a bargain is sought to be made with them and where there is no concealment of the agency. It then becomes a matter of traffic.

The learned justice, in the paragraph just quoted, seems to me to have stated the exact difference in principle between the cases relied on by the plaintiff and defendant in this action. All those upon which the plaintiff's counsel relies were cases in which property was sought to be sold to the government, and it was held that in employing an agent to make such sale reference might lawfully be had by the employer to the fact that the agent was of the same political party with those administering the government, and had acquaintances and a good reputation at the place where the sale was to be made (*Lyon* agt. *Mitchell*, *supra*; *Cummins* agt. *Barkalow*, 4 *Keyes*, 514; *Southard* agt. *Boyd*, 51 *N. Y.*, 177).

All the cases, however, hold that a contract for lobby services, for personal influence, for mere importunity to members of the legislature or other official body, for bribery or corruption, or for seducing or influencing them, for any other arguments, persuasions or inducements than such as bear directly and legitimately upon the merits of the pending application,

is illegal, and against public policy and void (*Brown* agt. *Brown*, 34 *Barb.*, 534; *Rose* agt. *Truax*, 21 *Barb.*, 361; *and see cases cited at p.* 374; *Harris* agt. *Roof's Exr.*, 10 *Barb.*, 489).

In *Mills* agt. *Mills* (40 *N. Y.*, 546), judge HUNT says: "It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results. It furnishes a temptation to the plaintiff to resort to corrupt means or improper devices to influence legislative action."

After examining the correspondence in this case and reading the testimony of the plaintiff, I do not see how the conclusion can be resisted that under the authorities to which I have referred the agreement between the plaintiff and defendant is void, as against public policy, and cannot be enforced.

The defendant's claim required the passage of an act of congress before it could be paid. The plaintiff, in substance, agreed to collect that claim, and as a part of the service to be performed by him he agreed to procure the passage of an act of congress. It is quite evident, also, from the correspondence, that he also agreed to importune and solicit, and that in fact he importuned and solicited, various members of the house of representatives; that he brought his personal influence to bear upon such members to secure the passage of the act, and that he also brought the personal influence of others to bear upon them to that end and for that purpose. As between the parties the defense in this case may be unconscionable and unjust; but as was well remarked by WRIGHT, J., in *Rose* agt. *Truax* (21 *Barb.*, 380), "their action (*i. e.*, the court's) is controlled by a principle having no respect to the equities between the parties, or their bad faith toward each other, but rests upon the solid and broad foundation of a wise and prudential governmental policy."

I at first entertained great doubts whether, under the answer, the defendant could avail himself of this defense.

The main allegation in the answer is, that the defendant was induced to enter into the agreement by reason of the plaintiff representing that he had paid for the defendant $1,000 in San Francisco.

It was, as I understand it, conceded on the trial that that sum had been in reality paid by the plaintiff. The answer, however, denies each and every allegation in the complaint, except as thereafter admitted, and also denies that the defendant is indebted to the plaintiff. Under these denials it was incumbent upon the plaintiff to make out an indebtedness to him; and as he could only proceed to do so by proving an agreement to pay for services which could not, for reasons of public policy, be made the subject of a legal contract, his cause of action fails. In any event, under the circumstances, I think that if an amendment of the answer is necessary, as the facts have been proven, such amendment should be allowed. One other point should be noticed. The plaintiff sues upon an agreement made after the passage of the act of congress was procured.

The consideration of the agreement, or a part of the consideration, was the service rendered by the plaintiff in procuring the passage of that act. If I am right in the conclusion that the previous agreement as to those services was void, as against public policy, the plaintiff's position is not bettered by the execution of a new agreement, or by a subsequent promise to pay for such services (*Grey* agt. *Hook*, 4 *Comstock*, 449).

The complaint must therefore be dismissed, with costs.

N. Y. COMMON PLEAS.

ALEXANDER B. MOTT agt. THE CONSUMERS' ICE COMPANY.

Discovery and inspection of plaintiff's books and papers — when application will be denied.

Where the application was made by defendant for a discovery and inspection of all books kept by plaintiff as a physician and surgeon from the time of the accident and for two years prior thereto, in order to ascertain what the value of and receipts from plaintiff's practice were and are, so that they may be prepared on the trial of that issue, the application being made upon affidavit of defendant's belief that plaintiff has kept and still keeps books in which are entries tending to show the amount of his receipts and charges, but does not describe or indicate any particular book or books of which discovery should be made:

Held, to be an inquisitorial examination of all the books, papers and documents that is sought in the hope that they contain evidence of the falsity of plaintiff's averments in his complaint, as to the extent and emoluments of his practice, and is within the rules laid down to prevent a mere fishing examination.

Neither party will be allowed a discovery to enable him to rebut an anticipated case of the other.

Where the party against whom a discovery is sought is a physician and surgeon, and resists an inspection of his books upon the ground that they contain, as part of his records, information derived from his patients, which is of a privileged character, the application will be denied.

PLAINTIFF is a physician and surgeon, residing and having his office in New York city.

In June, 1872, he was driving down Fourth avenue, visiting his patients, and shortly before reaching Eighteenth street he drove up near the curb-stone on the right-hand side of the avenue, and stopped.

Whilst thus standing there, sitting in his carriage, one of defendant's ice wagons, driven with great force and carelessness by one of its servants, turned into the avenue out of Eighteenth street, and ran into the doctor's carriage, throwing him out on to the sidewalk, severely injuring him, breaking his carriage and harness, and injuring his horse.

In consequence of the injuries so sustained by Dr. Mott, he was confined to his house for more than ten weeks, and is still unable to attend to night practice.

Dr. Mott claims in his complaint in this action, that during the period he was so confined to his house his business was of the value of $100 per day; that he has also sustained damage since the expiration of said ten weeks of $200 per week; and that during the remainder of his life, by reason of said injuries, he will be unable to devote his full time to his profession, for which he also claims damages.

In October, 1876, defendant's attorneys made a motion for an inspection of Dr. Mott's books of account, which came on for argument October thirtieth before judge J. F. DALY, and by him denied, with costs.

The opinion of judge Daly upon his decision of the motion will speak for itself.

A. P. Whitehead, for motion.

Hatch & Van Allen, opposed.

J. F. DALY, *J.* — Plaintiff sues for damages for injuries sustained by reason of a collision between the carriage in which he was sitting, in Fourth avenue, near Eighteenth street, in the city of New York, and an ice wagon driven by a servant of defendant, caused, as the complaint avers, by the negligence of the latter. Plaintiff was thrown out and sustained injuries which he alleges prevented his attending to his profession and business as a practicing physician to his loss in the sum of $100 a day (that being the value of his

practice at that time) for ten weeks, and in the sum of $200 a week thereafter. Defendants deny all of the allegations in the complaint except their incorporation and that plaintiff was and is a practicing physician and surgeon.

Application is now made by defendants for a discovery and inspection of all books kept by plaintiff as such physician and surgeon from the time of the accident down to this time, and for two years prior to the accident, in order to ascertain what the value of and receipt from plaintiff's practice were and are, so that they may be prepared on the trial of that issue.

The application is made upon affidavit of defendant's belief that plaintiff has kept and still keeps books in which are entries tending to show the amount of his receipts and charges, but cannot, of course, describe or indicate any particular book or books of which discovery should be had. It is, in fact, an inquisitorial examination of all the books, papers and documents that he seeks in the hope that they contain evidence of the falsity of plaintiff's averment in his complaint as to the extent and emoluments of his practice, and as such falls, I think, within the rules laid down to prevent a mere fishing examination (*Brevoort* agt. *Warner*, 8 *How.*, 321; *Hoyt* agt. *Am. Ex. Bk.*, 1 *Duer*, 652; *Com. Bk.* agt. *Durham*, 13 *How.*, 541; *Davis* agt. *Dunham*, *id.*, 425).

The case before me differs from that in which the defendant is allowed to inspect the sales books of the plaintiff to establish in an action for infringement of trade-mark that no *bona fide* sales have been made by plaintiff (*Union Paper Collar Co.* agt. *Met. Collar Co.*, 3 *Daly*, 171), such fact being necessary to establish defendant's case.

It is said that the right of a defendant to a discovery is limited to documents which form a part of his case (*Wright* agt. *Morry*, 11 *Exch.*, 209).

So the plaintiff is said to have a discovery as to the manner in which defendant's case is to be established (*Hunt* agt. *Hewitt*, 7 *Exch.*, 236), and the rule is equally fair as to both

parties; in fact, it has been held that neither party is allowed a discovery to enable him to rebut an anticipated case of the other (2 *Wait's Practice*, 531 *d, and cases cited*).

The discovery here sought is unquestionably with a view to rebut the plaintiff's anticipated case, and to oppose his books to what is expected to be his oral testimony. But such a claim of right to discovery and inspection, if allowed, would extend this particular remedy to almost every case, and subject all parties seeking redress for injuries to the person to the same sort of visitation and inquisition they would be compelled to undergo if charged with defrauding the revenue.

The plaintiff, if he keeps books showing his gains and receipts from his practice, and refuses to produce them to support his own testimony on that point, subjects himself to certain presumptions against his claim which a jury would not be slow to apply, and in this respect the books of plaintiff are better witnesses for defendants out of court than in it.

But plaintiff resists an inspection of his books upon a ground that I deem fatal to the application, if no other considerations were presented, viz., that they contain as part of his records information derived from his patients, which is of a privileged character (3 *R. S.*, 611 [6*th ed.*], *sec.* 119).

Application denied, with ten dollars cost.

SUPREME COURT.

THE LUCUSTERINE FERTILIZER COMPANY agt. SILAS M. STILWELL and SILAS M. STILWELL, Jr.

Deed of real estate reserving certain property so situate as to be a part of the realty, with the privilege of removing same within a specified time — effect of such exception.

In a deed of real estate a reservation or exception of certain property upon the land so situate as to be a part of the realty, with the privilege of removing the same by a certain time, reserves no title in the grantor to the property so reserved, if not removed within the specified time.

In 1865 Regal M. Torrey, being the owner of a certain tract of land in Seneca county, conveyed the same to one Henry C. Spaulding, by deed which contained the following clause: "Excepting the beds or deposit of marl lying on both sides of the new cut for the Canandaigua river, which passes through said land, and it is an express stipulation and agreement between the parties hereto, that the said marl may remain on said land for a period of ten years from the date of this indenture, and that the party of the first part may, at any time within said ten years, remove a part or the whole of said marl." In 1867 Torrey, by bill of sale, conveyed the marl to Henry A. Barnum, under which bill of sale the plaintiffs claim. The defendants claim under the deed to Spaulding. Torrey died in 1870.

Held, first, that the exception in the Spaulding deed existed only in favor of Torrey, the grantor, and terminated with his life, if it did not expire with the ten years.

Second, that the exception was only of so much marl as Torrey might remove in ten years, and not of the entire quantity, if unremoved at the expiration of that period. All that was unremoved when the ten years had expired passed by the deed.

New York, Chambers, September Term, 1876.

MOTION by plaintiffs to continue an injunction.

Theodore M. Morgan, attorney, *Henry S. Bennett*, of counsel, for plaintiff.

John Commins, attorney, *Stilwell Gardiner*, of counsel, for defendants.

WESTBROOK, *J.*— Whilst one Regal M. Torrey was the owner of a tract of land in Seneca county, in the state of New York, for the purpose of improving the Erie canal, a cut was made through such premises and the excavations deposited upon both sides thereof.

On the 6th day of January, 1865, whilst still owning the land, Torrey conveyed the premises to one Henry C. Spaulding, by deed which contained the following clause: "Excepting the beds or deposit of marl lying on both sides of the new cut for the Canandaigua river, which passes through said land, and it is an express stipulation and agreement between the parties hereto, that the said marl may remain on said land for a period of ten years from the date of this indenture, and that the party of the first part may, at any time within said ten years, remove a part or the whole of the said marl."

In 1867 Torrey, by bill of sale, conveyed the marl to Henry A. Barnum, under which bill of sale the plaintiffs claim.

The defendants claim under the deed to Spaulding, which contains the exception hereinbefore given, and a conveyance from the devisees of Torrey, who, in 1869, had again acquired title to the premises conveyed to Spaulding by the foreclosure of a mortgage given for a part of the purchase money.

The questions which this cause presents are, among others, as to the effect of the exception contained in the Spaulding deed. Torrey died about the year 1870.

From the language of the exception in the Spaulding deed it is reasonably clear that it existed only in favor of Torrey and certainly terminated with his life, if it did not expire with the ten years. It is true that the "beds or deposit of

marl" are excepted from the grant, but "the express stipulation and agreement" (using the language of the clause creating the exception) "of the parties" to the deed, reserved the right to "the party of the first part" only, to, "at any time within said ten years, remove a part or the whole of said marl." The exception being only to the grantor himself, the rule contained in *Washburn on Real Property* (*3d edition, vol.* 3, *page* 371) applies: "If the exception be to himself, without words of inheritance, the grantor takes only a life estate; and if he means to retain a fee in what he excepts, he must limit it accordingly" (*See, also, Jamaica Pond Aqueduct Corporation* agt. *Chandler and others*, 9 *Allen*, 159–170; *Curtis* agt. *Gardner*, 13 *Metcalf*, 457, 461).

In this case, however, there was an express limitation to the exception. The words excepting the marl from the operation of the grant are to be read in connection with the whole clause; and so reading them it is apparent that the exception was only of so much marl as Torrey might remove in ten years and not of the entire quantity, if unremoved at the expiration of that period. After the exception of the marl is made the parties expressly agree that the marl may remain upon the land for ten years, and that during that time Torrey might remove the whole or any part of it. No provision for entry upon the premises conveyed to remove the material after that period is made, and without it the exception would be useless.

In *Holton* agt. *Goodrich* (35 *Vermont*, 19) it was held: "In a deed of real estate a reservation of the buildings and stone upon the land so situate as to be a part of the realty, with the privilege of removing the same by a certain time, reserves no title in the grantor to the property so reserved, if not removed within the specified time." In that case the language was: "*Ever* reserving the said meeting-house and meeting-sheds and all stones on the premises, *and* the privilege of getting said house, sheds and stone off from the premises till the 1st day of April, 1858." It will be noticed

that the reservation, following the language of the conveyance, was "*ever*," but the privilege of removing was "till the 1st day of April, 1858." Construing the clause as a whole the court say (*page* 21): "The intention of the parties, as collected from the deed and the character of the transaction, was that the plaintiffs should have no right to the property after the 1st of April, 1858, unless they remove it from the premises before that day. If the property was removed by that time it belonged to the plaintiffs, but if not removed by that time their right to it was gone. This seems to be the natural and obvious construction of the deed."

Looking at the kind of the material to be moved in the *Vermont Case* and that excepted for a similar purpose in the present, the manifest intention in the latter is even more obvious. It can scarcely be argued that if the right to remove the marl was an ever continuing one, productive as it would have been of ever continuing damage, the conveyance would have been accepted. Certain it is that there is no sense in the express stipulation of the parties giving the right of removal to the grantor for the period of ten years, if such right was not then to terminate. The "express stipulation and agreement between the parties" to the deed was very useless, unless it be construed to work a limitation upon the exception. Such agreement creates no forfeiture but limits the marl excepted from the grant to so much as might be carried away during the prescribed period. All that was unremoved when the ten years had expired passed by the deed.

The same point was decided by the general term of the third district, during the year 1866, in an unreported case. The title of the cause was *Samson & Boice* agt. *Simpson & Longyear*. It was a sale of hemlock bark upon a tract of land in Ulster county to be removed in a specified term of years. The court in that case also held that the true construction of the instrument was, that it was not a sale of all the bark upon the tract, but only of so much as should be

removed during the period prescribed for that purpose, and dissolved the injunction which had been obtained to prevent the defendants from peeling the bark, they having obtained title to the lot after the period had elapsed during which the plaintiffs had the right to carry it away. This case is referred to from memory, the writer of this opinion having been counsel therein for the defendants.

Having reached the conclusion hereinbefore stated it follows that the injunction cannot be continued, and that the temporary stay must be dissolved with ten dollars costs.

COURT OF APPEALS.

The Produce Bank agt. Joseph Morton *et al.*

Creditors' suits — when may be maintained — new trial — proper case for a motion under section 268 of the Code — appeal from order granting new trial — amount of judgment when entered governs question of appealability.

Before a plaintiff can commence or maintain an action in the nature of a creditor's bill, its remedy at law against the judgment debtors must first be exhausted.

Where the plaintiff begun his action against the three defendants as copartners, service of the summons and complaint was made on two of the defendants, judgment was entered and docketed by the clerk, on default, against the two defendants served only, and an execution on this judgment was issued to the sheriff against the property of the three defendants, which was returned "no personal or real property:"

Held, that the plaintiff had exhausted its remedy at law against the judgment debtors, so as to entitle it to proceed in equity to reach joint property (*Code, sec.* 294).

Held, also, that although the judgment upon which the execution was issued was not in form entered against the joint debtors, but only against the two who were served, yet it appeared on the face of the judgment roll that it was founded upon a joint obligation, and should have been entered in form against all the debtors, they all being parties defendant.

Held, also, that where there is a mistake or defect in the docket merely of form, the court has the power to amend the same.

It is not sufficient ground for setting aside an assignment, that the affidavit to the schedules or inventory was made before a person not legally qualified to administer the oath.

It seems that it was the intent of the legislature of 1874 (*Laws of* 1874, *chap*, 600, *p.* 824) to abrogate the rule laid down in *Juliand* agt. *Rathbone* (39 *N. Y.*, 369), and that the provision allowing the assignee within six months to file schedules was not intended as a condition, the breach of which should invalidate the assignment.

A motion for a new trial under section 268 of the Code is only allowable where the decision filed under section 267 *does not authorize a final judgment.*

Where the amount of plaintiff's claim was ascertained, judgment was rendered that the assignment be set aside, that the assignee deliver over the assigned property to a receiver, and that the plaintiff be paid out of the proceeds the amount of his claim and costs:

Held, that the judgment was final and reviewable by appeal; that the machinery of a reference and receivership was for the sole purpose of carrying the judgment into execution, and not the foundation of any further judicial action in the case.

An appeal from an order granting a new trial cannot be had to the court of appeals where the amount of the judgment or subject-matter in controversy does not exceed $500 (*Laws of* 1874, *p.* 378).

It seems that the amount of the judgment when entered must govern the question of appealability, and that interest accruing after its rendition cannot be added for the purpose of bringing it up to the requisite amount. Where judgment has been rendered for a specific amount that must be the test. Where there is no judgment or it is not for a specific sum, the value of the subject-matter in controversy must be ascertained.

November Term, 1876.

On February 4, 1874, the defendants Joseph Morton, Leon Weil and Alphonse Weil, composing the firm of Weil Brothers & Co., of the city of New York, made an assignment, as such copartnership, for the benefit of their creditors, to the defendant Austin Baldwin. The assignment was recorded in the office of the clerk of the city and county of New York, on the same day.

The assignors made and delivered certain paper writings, purporting to be the schedules, or the inventory required by chapter 348, Laws of 1860, section 2; but the affidavit required to be annexed to the inventory, or schedules, was made in the city of New York, before a notary public appointed for Kings county, who had not filed in the office of the clerk of the city and county of New York, any certified copy of his appointment or his autograph signature.

This paper, purporting to be the inventory or schedules, was not filed in the office of the clerk of the city and county of New York, as required by section 6, chapter 348, Laws 1860. But it was filed in the office of the clerk of the court

of common pleas, on February 19, 1874, and was produced therefrom on the trial.

The defendant Austin Baldwin, the assignee, entered into what purported to be a bond with sureties, as required by section 3, chapter 348, Laws 1860.

But this paper, purporting to be a bond, was executed and acknowledged in New York county, before a notary public appointed for Kings county, who had not filed a certified copy of his appointment in the office of the clerk of the city and county of New York, or his autograph signature.

This paper, purporting to be the bond, was also filed on February 19, 1874, and it was also produced on the trial, from the office of the clerk of the court of common pleas.

On June 22, 1874, the plaintiff begun an action in the superior court of the city of New York, against the defendants Joseph Morton, Leon Weil and Alphonse Weil, as copartners, and service of the summons and complaint, was made on two of the defendants, to wit, Joseph Morton and Alphonse Weil. On July 14, 1874, judgment was entered and docketed by the clerk, on default, against the two defendants served only, to wit, Joseph Morton and Alphonse Weil, for $458.50. And the same was docketed against those two defendants in the office of the clerk of the city and county of New York, after the filing of a transcript.

On January 7, 1875, an execution on this judgment was issued to the sheriff of the city and county of New York against the property of Joseph Morton, Leon Weil and Alphonse Weil, which was returned "no personal or real property," February 4, 1875.

On February 9, 1875, this action was begun, to set aside the assignment above mentioned, as fraudulent and void as against the plaintiff.

The defendants admit, in their answer, that they had no property, except as contained in the said assignment.

The case was tried before the court at special term, April 15, 1875; and on April 19, 1875, the case was reopened, and

the judgment roll and transcripts as amended by the order of the court at special term, *nunc pro tunc*, by adding the name of Leon Weil as one of the parties defendant in the judgment of July 14, 1874, were put in evidence.

On July 12, 1875, the findings of the court, or the decision, were filed, whereby it was found that the assignment was null and void, and that a receiver should be appointed to take charge of such property and effects as should be found by a referee in the hands of Baldwin, to which the plaintiff was declared to be entitled.

And that the receiver should pay out of such property or effects to the plaintiff or his attorneys the costs of the action and the amount of the said judgment of July 14, 1874, and interest on the same.

On July 21, 1875, judgment herein was entered with the clerk pursuant to this decision, in favor of the plaintiff and against the defendant.

On September 10, 1875, the defendants filed exceptions to the findings.

On November 27, 1875, the defendants served their notice of motion to be made at December general term for a new trial in the action pursuant to section 268 of the Code.

The motion was heard at December general term, and on the first Monday of January, general term, 1876, decision was given granting the motion, and the respondents entered an order thereon, January 4, 1876.

The plaintiff, on January nineteenth, appeals from such order to this court.

D. Judson Neuland, plaintiff's attorney.

Fransioli, Tilney & Mosher, defendants' attorneys.

RAPALLO, *J.*—We are of the opinion that the plaintiff had, before the commencement of this action, exhausted its remedy at law against the judgment debtors, so as to entitle it to pro-

ceed in equity to reach joint property (*Code, sec.* 294). An execution had, in fact, been issued against the joint property of all the debtors and returned unsatisfied. Under that execution such property might have been taken had any been found. Although the judgment upon which the execution was issued was not in form entered against the joint debtors, yet it appeared on the face of the judgment roll that it was founded upon a joint obligation, and should have been entered in form against all the debtors, they all being parties defendant. This execution was effectual until set aside, and had an application been made to the court to set it aside, it would have been perfectly competent to have directed an amendment of the judgment and docket, and allowed the execution to stand. The defect was one of form merely. All the requirements of the statute had been substantially complied with; the plaintiff was entitled to a judgment against all the defendants; and this appeared upon the face of the record, no extrinsic proof being required. The order amending the defect on the entry of judgment *nunc pro tunc* was, we think, valid and effectual (*Hart* agt. *Reynolds*, 3 *Cow.*, 42; *Chichester* agt. *Condee*, 3 *Cow.*, 39; *Mackay* agt. *Rhinelander*, 1 *Johns. Cases*, 410; *Hogan* agt. *Hoyt*, 37 *N. Y.*, 300; *Fawcett* agt. *Vary*, 59 *N. Y.*, 597, *and cases cited; Code, secs.* 173 *and* 174; *Close* agt. *Gillespie*, 3 *Johns. R.*, 526; *Bradford* agt. *Read*, 2 *Sandf. Ch.*, 163). But although the plaintiff had a standing, as an execution creditor, sufficient to entitle it to assail the assignment, it has not, in our judgment, shown sufficient cause for setting the assignment aside. The only points urged against it were, that the affidavit to the schedules or inventory was made before a person not legally qualified to administer the oath, and that the schedules and bond were not filed in the proper office. In the case of *Juliand* agt. *Rathbone* (39 *N. Y.*, 369) it was held that the making and delivery of the verified schedules, required by section 2 of the act of 1860 (*chap.* 348), was essential to the validity of the assignment. But since that decision the legislature passed

the act of 1874 (*chap.* 600, *p.* 824), which provides that the omission to make or deliver the schedules shall not invalidate the assignment.

We think that it was the intent of this act to abrogate the rule laid down in *Juliand* agt. *Rathbone*, and that the provision allowing the assignee within six months to file schedules was not intended as a condition, the breach of which should invalidate the assignment. It can hardly be supposed that it was the intention of the legislature to leave it uncertain during the six months allowed for filing the schedules, whether the title to the property was in the assignee, or to deprive him during that interval of the power of making any valid disposition of it. There was no proof that the bond was not filed in the office of the county clerk, nor was there any allegation in the complaint of any omission in respect to the assignee's bond. The complaint rests wholly on the omission to deliver verified schedules. We therefore agree upon the merits with the conclusion arrived at by the court, at general term.

But the point is made that the case was not properly before the general term; that it was not a proper case for a motion for a new trial (*sec.* 268 *of the Code*). We are inclined to the opinion that this point is well taken, and that the judgment was final, and reviewable by appeal. There was nothing left to be judicially determined. The amount of the plaintiff's claim was ascertained, judgment was rendered that the assignment be set aside, that the assignee deliver over the assigned property to a receiver, and that the plaintiff be paid out of the proceeds the amount of his claim and costs. This was a final disposition of the whole controversy, and no further judgment was to be rendered. The machinery of a reference and receivership was for the sole purpose of carrying the judgment into execution, and not the foundation of any further judicial action in the case. But the respondent claims that the case is not appealable to this court, the amount in controversy being less than $500 (*Laws of* 1874, *p.* 378).

The judgment was entered July 21, 1875, and the sum directed to be paid to plaintiff for principal and interest amounted to only $491.20. That judgment is all that the appellant has at stake. A new trial has been ordered, and the object of this appeal is, by the reversal of that order, to restore the judgment. We think, in such a case, the amount of the judgment, when entered, must govern the question of appealability, and that interest accruing after its rendition cannot be added for the purpose of bringing it up to the requisite amount. According to our construction of the act of 1874, it prohibits an appeal from an order granting a new trial where the amount of the judgment or subject-matter in controversy does not exceed $500. In appeals from orders granting or refusing a new trial where judgment has been rendered for a specific amount, that must be the test. Where there is no judgment, or it is not for a specific sum, the value of the subject-matter in controversy must be ascertained.

The appeal should be dismissed with costs.

All concur; MILLER, J., in result.

SUPREME COURT.

BALLOU *et al.* agt. PARSONS *et al.*

Reference — when and how terminated where an oral agreement has been made, extending indefinitely the time within which report may be made and delivered — duty of clerk upon taxation of costs in action tried by referee.

In the absence of any stipulation or agreement of the parties to extend the time within which the decision of a referee should be made and delivered, section 273 of the Code must govern. In such case, a notice from the party of an election to end the reference after the statutory time has expired, forecloses all further right to proceed, on the part of the referee.

But where an oral agreement is made in open court, upon final submission, extending indefinitely the time within which the report may be made and delivered, the reference cannot be terminated in the manner provided by section 273 of the Code. The fairer and better rule of practice would *seem* to be, to require, in such a case, a notice to the party and referee, one or both, that unless the report is made and delivered within a reasonable time, to be specified, the reference will be deemed ended.

Gregory agt. *Cryden* (10 *Abb.*, 289) *distinguished.*

Upon taxation of costs, in an action tried by a referee, the clerk has no right to question the regularity of the referee's report. His decision, awarding judgment, stands before the clerk as the mandate of the court, and, until vacated and set aside on proper application to the court, its direction must be obeyed.

THIS case was first heard at special term, before Mr. justice BOCKES, on the motion alluded to in the opinion. The following opinion was delivered at special term. On appeal to the general term, third department, the order was affirmed on the opinion at special term. An appeal was then taken to the court of appeals, when the order appealed from was also affirmed, as reported, "on opinion of BOCKES, J., below"

(55 *N. Y.*, 673). The following is the opinion of Mr. justice BOCKES in full.

A. D. Wait, for plaintiffs.

N. G. Paris, for defendants.

BOCKES, *J.* — Two motions heard together, one by the plaintiffs, to compel the clerk to adjust their costs and enter judgment, the other by the defendants, to set aside the report.

The disposition of the motion to set aside the decision of the referee will, of course, determine the other; but it may be remarked, here, that the refusal of the clerk to adjust the plaintiffs' costs and to enter judgment according to the decision was wrong. The referee's decision, awarding judgment, stood before the clerk as the mandate of the court. The clerk had nothing to do with the question whether it had been regularly obtained. That question was for the court, on proper application. Until vacated and set aside, its direction for judgment should be obeyed.

The important question, however, is now as to the regularity of the referee's decision, whether it was made and delivered in due time.

The case was a long time on trial before the referee, and was finally submitted to him for decision on the 9th of April, 1869. He held it under advisement until November 19th, 1872, when he made and delivered his decision, awarding judgment to the plaintiffs for $6,113.80, the amount claimed in the complaint, with costs. In the mean time, and on the 28th October, 1872, the defendants' attorneys served the plaintiff's attorney with a notice of their election to terminate the reference.

Now in the absence of any stipulation or agreement of the parties to extend the time within which the decision should be made and delivered, of course the report was out of time, and irregular (*Code, sec.* 273). In that case, the notice from

the party of an election to end the reference foreclosed all further right to proceed, on the part of the referee (10 *Abb.* [*N. S.*] 289).

But while it is conceded that there was no stipulation or agreement of the parties in writing to extend the time, it is claimed and urged that there was an oral agreement before the referee in open court, made at the time of the final submission to him, extending the time within which the report might be made and delivered, indefinitely. And it is further insisted that when such an indefinite extension is given, a party cannot terminate the reference and bar a right to a decision by the referee, by serving notice of an election to end the reference; that in such a case a reasonable notice to the referee and opposite parties should be given that a report is demanded; or an order should be obtained from the court, requiring a report within a specified time.

The first question here is one of fact; whether the time was extended indefinitely, as is claimed.

After a very careful examination of the papers submitted on the motion, I am of the opinion that it must be found that the parties had that understanding, amounting to an agreement to that effect. Such, I think, is the weight of evidence, on the papers submitted, and I am bound, I think, so to hold. This understanding and agreement was made and entered into in the presence of the referee, at the time of the submission of the case to him for decision, and he was a party to it. Indeed it was made for the benefit and convenience of the referee, as well as in the interest of the parties themselves, who desired a full and careful consideration of the case; entered into in the presence of the referee, at the time of the submission. The agreement must be deemed to have been made in open court. A stipulation or agreement thus made, relating to the conduct of the suit, is binding on the parties (25 *How. Pr.*, 1; 41 *Barb.*, 648; 7 *Paige*, 587). To hold it binding seems to me but fair and just to the parties and to the referee. If these conclusions be sound, the case is the

same as if the parties had agreed and stipulated in writing for an indefinite extension of time for the referee to make and deliver his report.

The next question is, how such indefinite extension of time may be terminated. Undoubtedly either party may terminate it by some fair proceeding. The question is, how it may be done. Can it be terminated abruptly and instanter, by the service of a notice on the opposite attorney, of an election to end the reference? Is this quite right to the party and to the referee, who may have delayed his report relying on the agreement of extension? Should not a little time be allowed before foreclosing further action? The fairer and better rule would be, as it seems to me, to require, in such cases, a notice to the party and referee, one or both, that unless the report is made and delivered within a reasonable time, to be specified, say ten or twenty days, the reference will be deemed ended. This would render definite what was before left, by stipulation, indefinite. This rule is in conformity also with that applied to all agreements where performance is left indefinite, and it is just in its application. Such, too, is the spirit of the decision in *Thiesselin* agt. *Rossett* (3 *Abb.* [*N. S.*], 54). It was there held, in substance, that relief should be obtained against delay by application to the court for an order of limitation. But I see no necessity for such application, where the party and referee have been duly notified of an intention to terminate the reference, fixing in the notice a reasonable time within which the report may be made and delivered. This would be a fair way to terminate the stipulation for an indefinite extension.

Under such a rule of practice either party could end the reference without unreasonable delay. Either could serve a notice on the opposite party and referee, at any time, limiting the period within which the report should be delivered. Had this fair rule of practice been applied to this case the great delay which has existed could have been prevented by a reasonable notice from either party. If so inclined, either

party could have obtained a report or terminated the reference, in twenty days following the time given the referee by section 273.

Again, I think the referee has rights, after an extension like that given in this case, which should not be ignored. Where there is no extension of the time, he is bound to make and deliver his report within sixty days after submission, or the consequences follow specified in section 273. But he should not be held to the penalty of a forfeiture and loss of fees fairly earned, perhaps to a large amount, for a delay to which the parties gave consent.

The case of *Gregory* agt. *Cryder* (10 *Abb.*, 289), was one wherein there was no extension of time, nor waiver of strict compliance with the provisions of section 273. That case differs, on the facts, from this under examination.

After considerable reflection, I am brought to the conclusion that the notice served on the plaintiffs' attorney did not have the effect to terminate the reference, and that the report thereafter made and delivered by the referee is not irregular.

The motion to vacate and set aside the report or decision of the referee must be denied, and the plaintiffs are entitled to have judgment entered thereon, with costs. The clerk will now, of course, adjust the plaintiffs' costs, and insert them in the entry of judgment. Costs of but one motion are allowed.

N. Y. COMMON PLEAS.

Edwin Booth agt. Jarrett & Palmer.

Trade mark — when the use of an individual's name attached to a theater or public building will not be restrained by injunction as being in the nature of a trade mark.

Where the plaintiff executed a release of his theater which he had built corner of Sixth avenue and Twenty-third street, in the city of New York, and which he called "Booth's theater," to Junius B. Booth; *he* afterwards assigning his lease to the defendants, the premises in both instances being designated as "Booth's theater;" the plaintiff also executed several mortgages in which the premises are described by metes and bounds, to which description is added the words "being the premises known as Booth's theater in the city of New York;" under a foreclosure of one of the mortgages, the receiver duly appointed in the foreclosure proceedings by direction of the court, executed an agreement by which the defendants were accepted as tenants "of the property known as Booth's theater," and since this agreement, up to the present time, the defendants have been carrying on the theatrical business at said theater, designating the same as "Booth's theater," but representing themselves as the lessees and managers:

Held, that the plaintiff was not entitled to an *injunction* to restrain the defendants from using the name "Booth" in connection with the theater heretofore known as "Booth's theater," of which the defendants are the lessees.

Held also, that the plaintiff, by his acts, has affixed his name to the theater, so that his grantees and their successors have the right to call this building "Booth's theater," the name which he has given it.

Special Term, November, 1876.

This suit is brought by Edwin Booth, as plaintiff, to restrain Messrs. Jarrett & Palmer, the defendants, from using the name "Booth" in connection with the theater heretofore

known as "Booth's theater," situated on the corner of Twenty-third street and Sixth avenue, and of which the defendants are lessees. In his complaint Mr. Booth also asks for $10,000 damages for the loss he claims to have sustained by the use already made of his name in this respect. This motion is made on the part of plaintiff to temporarily restrain the use of his name pending the final determination of the action.

Luke A. Lockwood, for plaintiff, argued that the use of Mr. Booth's name, in connection with the theater, was only intended by him to continue as long as he was interested in or connected with it; that his interest in it ceased in 1874, when the property was sold under foreclosure; that, as matter of law, the defendants had no right to continue the use of his name without his consent; that he has refused such consent, and protested against its further use, and that his own use of it, in connection with a theater, being in the nature of a trade mark, it became a trade mark property, for the protection of which he had a right to successfully invoke the equitable relief demanded; that the use of his name in connection with the theater was exclusively his own personal right; that the word "Booth's" indicated that he owned, had possession of, or conducted the theater, and having long since ceased to do any of these it could no longer be properly called "Booth's theater;" that even if he gave Junius B. Booth the permission to continue such name, he had a right to withdraw that permission, and did so now in respect to the defendants, who are the assignees of the lease to Junius B. Booth.

Benjamin F. Russell, for defendants, alleged as matter of fact that in 1873 the plaintiff made a five years' lease of the theater to Junius B. Booth, describing it as "Booth's theater;" that subsequently this lease, the theater still bearing the same name, was assigned to defendants with the knowledge and assent of plaintiff and all parties who had become

interested in the property through him, and under the direction of the supreme court; that the name "Edwin Booth" had never been used in connection with the theater in question; that the public had not been deceived by the use of the name "Booth," and that plaintiff had never sustained any damage thereby. As matter of law, he argued that Mr. Booth never had an exclusive right to the name "Booth," there being others, even of his own family, after whom it might be named; that a person could not make a trade mark of his own name, and thus obtain a monopoly of it which would debar all other persons of the same name from using their own names in their own business; that assuming the plaintiff had at some time or other the exclusive right to the use of the name Booth in connection with the theater, he had no legal claim to it now, having leased it under the name of "Booth's theater," of which lease defendants became assignees, with his consent and approval; that Mr. Booth having called the theater "Booth's theater," having leased it, mortgaged and conveyed it as such, the name had become a part of the property in the hands of its present owners and lessees, as much as if the Astor House had been leased or conveyed as the Astor House.

VAN BRUNT, *J.*—In or about the year 1868 the plaintiff, at the corner of Twenty-third street and Sixth avenue, in the city of New York, built a theater, which he called "Booth's theater." From February, 1869, to the 30th of January, 1873, the plaintiff managed the said theater and obtained a great reputation for the said theater under the name of "Booth's theater." On this last mentioned date the plaintiff executed a release to Junius B. Booth, of the theater in question, under the following designation: "All those certain premises situate on the southerly side of Twenty-third street, between Fifth and Sixth avenues, and known as Booth's theater, in the city of New York." On the 7th day of April, 1874, the said Junius B. Booth assigned this lease

to the defendants. In the month of November Edwin Booth executed a mortgage to Oakes Ames upon the theater, in which mortgage the premises are described by metes and bounds, to which description is added the words, "being the premises known as Booth's theater, in the city of New York." A mortgage was also given to Simon Wormser on the said premises, which was foreclosed, and the premises conveyed to Oliver Ames, in February, 1876, by the same description. Mr. William M. Pritchard having been duly appointed receiver of said premises in the action to foreclose the Wormser mortgage, by direction of the court executed an agreement by which the defendants were accepted as tenants of the property known as Booth's theater, upon the terms and conditions set forth in the said lease to Junius B. Booth, excepting certain modifications contained in said agreement, and since the execution of this agreement up to the present time the defendants have been carrying on the theatrical business at said theater, designating the same on their hand-bills and bill-boards as "Booth's theater," but representing themselves as the lessees and managers. The plaintiff claiming that by the use of the name of "Booth's theater" the public will be misled into believing that he is still the manager of this theater, and that they will be deceived into going to the theater, supposing that plaintiff still acts there, and that he will be injured thereby, brings this action to restrain the defendants from the use of the name of "Booth's theater." I am unable to see how the injunction asked can be granted. The plaintiff has built a public building and christened it "Booth's theater." He has acquired for that under that name a reputation as a place of public amusement. Having thus increased the value of the premises by that reputation, he has mortgaged and leased them under the name he had given them, and there is no doubt from the manner in which the premises are described in the lease to Junius B. Booth that one of the inducements to the lease was the public reputation which Booth's theater had acquired as a place of public amusement.

The defendants have succeeded to all these rights, and one of them seems to me is the name by which the plaintiff has conveyed these premises. It is to be borne in mind that there is no attempt upon the part of the defendants to conceal the fact that they are the lessees and managers of this theater. What, under these circumstances, does the use of the name "Booth's theater" indicate to the public? Nothing more, I imagine, than that this theater was built by the plaintiff; that this is the theater which he named upon its construction "Booth's theater," and the place of amusement which had become known to the public under that name. The facts developed in this case are far from bringing it within the principles laid down in the case of *Howe* agt. *Searing* (19 *How. Pr. R.*, 14), relied upon by the plaintiff as an authority to support his claim in this action. In that case the assignees of Howe conducted the whole business in his name, and the court upheld the injunction on the ground "that it was against public policy to allow a business to be conducted under any other name than that of the actual parties doing it." It seems to me that the plaintiff, by his acts, has affixed his name to the theater, so that his grantees and their successors have the right to call this building "Booth's theater," the name which he has given it.

The motion for an injunction must be denied, with ten dollars costs.

N. Y. SUPERIOR COURT.

ISAAC W. WINN *et al.* agt. CHARLES P. CROSBY.

Assignees — their duties as to trust funds — attorney who acts as assignee, no power to apply trust funds to the payment of his professional services rendered in the administration of his trust.

Where an attorney becomes assignee of an insolvent firm, and prior to the assignment receives from such firm certain notes, to provide a fund to meet the counsel fees and disbursements of future litigations arising under it affecting them, and a fee of $5,000 was then stipulated and agreed upon between the parties for that purpose.

Held, that the assignee having collected over $5,000 from these notes, should be chargeable with the surplus.

An assignee who is an attorney is precluded from applying the trust funds to the payment of himself, or of firms in which he may be a partner, for professional services rendered in the administration of the trust.

Where the defendant as assignee received as part of the property of the insolvent firm, four notes of Asa D. Dickinson, amounting to $42,720, given for the purchase-price of the stock of goods belonging to the insolvent firm, said notes being received by the defendant when the assignment was executed and the day after they were made, and after retaining these notes for a number of years, in order to prevent the statute of limitations from affecting the same, took from Dickinson notes of equal amounts, with interest, to himself individually, and some collateral security therefor, surrendering the old notes; these notes the defendant claims to now hold, and in his answer he sets up that Dickinson the maker is responsible; the defendant has never taken any legal proceedings to enforce their payment; the only reason given by the defendant why they had not been collected was that Dickinson claimed that he had paid too high a price for the goods and that he had a partial defense to the notes; the value of the goods are found by the referee to be as much as the amount of the notes:

Held, that in view of this delay, for these many years, of the defendant, in omitting to take legal steps to enforce the collection of the notes, his transferring them to Dickinson for other notes, payable to himself,

individually, and the probable detriment to the assigned estate which the delay has occasioned, shows such neglect as is sufficient to charge him with them. There is no other way by which the trust estate can be protected from prejudice by the failure of duty on the part of the defendant as assignee, than by charging him with the notes.

Special Term, October, 1876.

MOTION by plaintiff to confirm a referee's report and for judgment or other relief.

George E. King, for motion.

S. W. Fullerton, opposed.

CURTIS, *Ch. J.* — The action was commenced in November, 1873, on behalf of the plaintiff and other creditors of the insolvent firm of Townsend, Baker & Co., for an accounting by the defendant, as their assignee under an assignment executed December 28, 1867. When the cause was reached for trial, February 12, 1874, an accounting was ordered, and it was referred to the Hon. Enoch L. Fancher to take and state the accounts of the assignee, to ascertain and report who were the creditors of Townsend, Baker & Co., and the amounts respectively due them; also, what fees, commissions and disbursements should be allowed to the assignee; and it was further ordered that he should account for all the assets of Townsend, Baker & Co. coming into his hands, and for all his acts in connection with the assignment and execution of the trust.

It was also ordered that the referee take proofs concerning any property of the insolvent firm received by the assignee prior to the assignment, or disposed of by them under his advice prior to the assignment, and that their books and papers should be produced. It was, also, among other things, ordered that the referee should give notice to all the creditors to come in and produce their claims.

The referee, by his report dated January 15, 1876, sets forth that he has caused notice to be given to the creditors of

the firm of Townsend, Baker & Co., in conformity to the order; that he has taken and stated the accounts of the defendants, and in other respects complied with the order of reference. The referee also reports, that after allowing all credits there is a balance, for which the defendant is liable, of $73,004.16, and that this sum should be immediately distributed by the defendant among the creditors, according to the amounts of their respective claims, proved and allowed on the accounting and shown by his report.

Exceptions have been taken to the referee's report by one of the creditors, and also by the assignee. The creditor objects that the referee has allowed a claim that is void for usury, or else that if the claim is not void for usury it is untenable, because the claimant was a partner in the firm of Townsend, Baker & Co. The proofs taken on the hearing before the referee do not sustain these objections. The defendant excepts to the disallowance by the referee of certain items charged by him for counsel fees and legal services, rendered by himself and certain firms of which he was a member, in respect to the assigned estate and the execution of his trust.

The referee finds that the defendant, in his individual capacity, received of Townsend, Baker & Co., prior to the assignment, certain notes to provide a fund to meet the counsel fees and disbursements of future litigations arising under it affecting them, and that a fee of $5,000 was then stipulated and agreed upon between the parties for that purpose, and that the defendant having collected over $5,000 from these notes, should be chargeable with the surplus.

The principle by which an assignee, who is an attorney, is precluded from applying the trust funds to the payment of himself, or of firms in which he may be a partner, for professional services rendered in the administration of the trust, seems to be too just and too well settled to be disturbed (*Collins* agt. *Carey*, 2 *Beavan*, 128; *Nichols* agt. *McEwen*, 21 *Barb.*, 65, 67; *affirmed* 17 *N. Y.*, 22; *Morgan* agt. *Hannas*, 49 *id.*, 667).

There is reason for approving the conclusion arrived at by the referee, that the defendant should not be credited with this class of items for professional services charged by him, especially in view of the arrangement by which a compensation of $5,000, as already stated, was secured to him and allowed by the referee.

The defendant excepts to the finding of the referee charging him with the amount due upon four notes of Asa D. Dickinson, for $10,680 each, dated December 27, 1867, at three, six, nine and twelve months respectively, given to Townsend, Baker & Co. for the purchase of their stock of goods. These notes were received by the defendant when the assignment was executed and the day after they were made.

The referee finds that the value of the goods was as much as the amount of the notes; that Dickinson received, examined and retained the goods, at a valuation agreed upon at the time, much below their cost-price; that the defendant, in order to prevent the statute of limitations from affecting the notes, has taken from Dickinson notes of equal amounts, with interest, to himself individually, and some collateral security therefor, surrendering the old notes. These notes the defendant claims to now hold, and in his answer sets up that Dickinson, the maker, is solvent and responsible. It appears by the answer that the defendant has never taken any legal proceeding to enforce their payment.

No sufficient reasons are shown for such delay. In view of this delay for these many years of the defendant in omitting to take legal steps to enforce the collection of the notes, his transferring them to Dickinson for other notes, payable to himself individually, and the probable detriment to the assigned estate which the delay has occasioned, the referee considers that such neglect is shown on the part of the defendant as is sufficient to charge him with them.

Upon considering the connection of the defendant with the sale of the stock of goods previous to the assignment, his

transactions in reference to it as shown by the testimony; the course pursued by him in regard to the notes; the unsatisfactorily explained delay in collecting them or taking legal steps to collect them, since December 27, 1867, when they were made; the prejudice arising from this delay; the substitution of them for others payable to himself individually, there seems to be just ground for sustaining the finding of the referee, charging the defendant with them.

An approval or confirmation by the court of the course pursued by the defendant in the execution of his trust, in respect to these notes, would be a departure from what is universally recognized as obligatory upon trustees in the execution of a trust, and tend to establish a pernicious precedent.

It will be observed that the referee does not charge the defendant with interest, during this delay, upon the cash assets of the trust in his custody.

No other way appears by which the trust estate can be protected from prejudice by the failure of duty on the part of the defendant as assignee than by affirming the action of the referee in charging him with the notes (*Litchfield* agt. *White*, 3 *Sand.* [*S. C.*], 545; *affirmed*, 7 *N. Y.*, 438; *Royall's admr.*, agt. *McKenzie*, 25 *Ala.*, 363).

The only remedy that can be considered on this application is that appertaining to the confirmation of the referee's report. The order of reference is in the nature of an interlocutory judgment for an accounting. By the last paragraph of this order, each party is precluded from moving for judgment or other relief until after the confirmation of the referee's report, in which event the order provides that either party may move as he shall be advised, on the usual notice of motion.

The motion to confirm the report of the referee should be granted.

N. Y. COMMON PLEAS.

JOHN TILTON *et al.* agt. THE UNITED STATES LIFE INSURANCE COMPANY *et al.*

Examination of parties who are made defendants before trial—what affidavits must contain on which to found the order.

The examination of parties who are made defendants in expectation or hope that upon their examination some cause of action may thereby be discovered against them or against any co-defendant, will not be allowed where no cause of action is shown by *affidavits* to exist against them in favor of plaintiffs.

Affidavits on mere information and belief, not stating any of the evidence upon which such belief is founded, are wholly insufficient for such purpose.

The distinction between an affidavit and complaint pointed out.

Special Term, December, 1876.

MOTION to vacate order requiring defendants to be examined on the part of plaintiffs for the purpose of enabling the plaintiffs to make and serve their complaint in this action.

W. J. Butler, for plaintiffs.

A. J. Vanderpoel, for defendants.

VAN BRUNT, *J.*—This is a motion to vacate an order requiring the defendants James Buell, Clarence P. Fraleigh and John E. De Witt to be examined on the part of the plaintiffs for the purpose of enabling the plaintiffs to make and serve their complaint in this action. The defendants base their motion upon the ground that the affidavits of the

plaintiffs, upon which the order for examination was obtained, contains no evidence of the existence of any cause of action against them in favor of the plaintiffs, and that they have been made parties only in the expectation and hope that upon their examination some cause of action may be discovered against their co-defendant, the United States Insurance Company.

The affirmations of the affidavits against the defendants Buell, Fraleigh and De Witt are embraced between folios 23 and 32, both inclusive, and every affirmation is upon information and belief, without in a single instance giving the source of their information or its nature, or the ground upon which the belief is founded.

The allegation of a fact upon information and belief in a complaint, without stating any of the evidence upon which that belief is founded, is a perfectly good allegation, because it is the duty of the pleader to state the facts upon which he believes his cause of action is founded, and not any part of the evidence tending to establish those facts. The office of an affidavit is very different. An affidavit must not only state facts, but also the evidence tending to establish those facts. It is the weight of the evidence disclosed in an affidavit that gives it its influence. The court must be satisfied from the evidence which the affidavit contains that the facts exist entitling the party to the remedy sought. It is in most cases, there being a few exceptions, a matter entirely immaterial what the affiant believes from the information which he has received. The question necessarily is, is the court satisfied that the information conveyed, considering its character and the source from which it comes, justifies the affiant in the belief to which he has sworn?

That this is the true function of an affidavit is distinctly recognized by the Code, because it requires in every instance a party applying for a provisional remedy to show that he is entitled to it by evidence furnished by affidavits, and that, too, in one instance where the complaints must be before the court at the same time. An injunction cannot be granted

unless it shall appear by the complaint that the plaintiff is entitled to such relief, but that sufficient grounds therefor exist must be shown by affidavits to the court or judge. And how is it possible for the court or judge to be satisfied that sufficient grounds therefor exist except by a disclosure by the affidavits of the evidence by which the plaintiff proposes to establish the facts in his complaint, and which, if established, entitles him to the injunction? It seems to me, therefore, that an affirmation in an affidavit, upon information and belief, without giving the evidence upon which that belief is founded, is entirely nugatory and presents to the court nothing upon which it can act.

I am aware that it is a common form of drawing an affidavit, but I think upon a moment's reflection it will be seen that there is the distinction which I have suggested between an affidavit and a complaint, and which must be preserved. I think, therefore, that all the affirmations in the affidavits upon which the order for the examination of the defendants were founded, being upon information and belief, and the affidavits not stating any of the evidence upon which such belief is founded, there is no evidence that any cause of action whatever exists in favor of the plaintiff against the defendants sought to be examined, and the order for such examination should be vacated, with ten dollars costs of motion.

SUPREME COURT.

Francis D. Moulton agt. Henry Ward Beecher.

Venue—place of trial, how and when may be changed.

A plaintiff may amend his complaint of course, within the time prescribed by section 172 of the Code for such purpose, changing the place of trial. But the exercise of such right, by the language of the statute authorizing it, *cannot prejudice proceedings already had.*

Where a notice of motion to change the place of trial had already been given by the defendant, the plaintiff, by an amendment of his complaint, sought to remove the cause from the locality originally designated in the complaint, thus seeking to prevent the court, upon the motion then noticed, from exercising its own independent judgment as to the place best fitted to try the action with impartiality to both parties:

Held, that the act of the plaintiff in making such change could not defeat the motion of which notice was given or the discretion of the court as to the proper place of trial. The motion cannot in any way be prejudiced by the amended complaint.

Where, as in this case, the parties concerned hold prominent positions, the matters involved having been continually discussed for a long period by the public press, and by nearly every individual in the community, and a long and exhaustive trial having been had against the same defendant, continuing six months, daily reported in the papers, and continually and feelingly discussed, such trial resulting in a disagreement of the jury:

Held, that the obtainment of a fair, impartial and intelligent jury in such county would be an impossibility, and a motion for a change of venue is fully justified.

A cause should not be tried in a locality the general sentiment of which one of the parties to the action has sought, by appeals through the public press, to control, and which he has himself selected as a place of trial.

The fairness of a trial should be above and beyond suspicion, and the court should not allow a trial by a jury of a vicinage, the general opinion and belief of which, upon the matters involved in such trial, either party has industriously, through newspapers, sought to form.

N. Y. Chambers, September Term, 1876.

Moulton agt. Beecher.

MOTION to change the place of trial from Kings county to some other, on the ground that a fair and impartial trial cannot be had therein.

Messrs. Shearman, Vanderpoel & J. L. Hill, for defendant and motion.

Messrs. S. W. Fullerton & R. A. Pryor, for plaintiff and opposed.

WESTBROOK, *J.* — This action is for malicious prosecution. The complaint charges the defendant with falsely and maliciously, and without probable cause, procuring the indictment of the plaintiff by a grand jury of Kings county for the publication of certain alleged criminal libels upon the defendant. It is conceded that the alleged libelous publication related to the well-known accusations of Mr. Theodore Tilton against the defendant, and that this trial will involve the same issue with that of *Tilton* agt. *Beecher*, which, though continued for several months, resulted in the disagreement of a jury in the city court of Brooklyn, and also with that which has so long agitated the public mind by discussions in the public papers, and by trial in ecclesiastical courts.

The place of trial originally designated in the complaint was the county of Kings, the locality in which both parties resided during the time of the alleged occurrence of the events to which the issues of the action relate, and in which they are charged to have transpired. When, however, notice of motion to change the place of trial from the county of Kings to one more remote from the residence of the parties was given, the plaintiff, by an amendment of his complaint, sought to remove it from the city of Brooklyn to the city of New York, as was, perhaps, his technical right to do, thus seeking to prevent the court, upon the motion then noticed, from exercising its own independent judgment as to the place

best fitted to try the action with impartiality and fairness to both parties.

As notice of the present motion had already been given when the amended complaint which seeks to change the place of trial was served, and as the Code (*sec.* 172), provides that such an amendment shall be without prejudice to the proceedings already had, it follows that the court must exercise its own judgment in the selection of a place of trial, and that the action of the plaintiff in making such change cannot defeat the motion of which notice was given, or the discretion of the court as to the proper place of such trial (*Toll* agt. *Cromwell*, 12 *How.*, 79). It is true that the plaintiff by the amendment of his complaint has exercised a legal technical right, but as such right, by the language of the statute authorizing it, cannot "prejudice * * * proceedings already had," it is not seen how the change made can have, on the disposition of this motion, any other or greater effect than if, without the service of an amended complaint, the plaintiff in open court had — conceding the county of Kings not to be the proper place for trial — offered to consent to an order transferring it to the city of New York. If the amendment is to have a greater effect than this, the proceedings in the action are prejudiced thereby; for by those already had, the court was empowered to decide whether or not the county of Kings was a proper place for the trial of the action, and if not, what was the proper county for such trial, which right of judgment, fairly committed to the court by the proceedings in the action, is taken away if the amendment to the complaint is to have any other effect than that which has been stated. Whilst the letter, then, of the statute giving the right to amend is conceded, it can only be conceded in the very language thereof, and that requires us to judge and decide this motion upon the pleadings as they then stood and upon the place of trial as then fixed. Any other construction ignores plain words, and enables a party to divest a

court of the discretion to fix the place of trial, having due regard to the administration of justice, with which it was fairly intrusted.

Treating this motion, then, as it stood when notice thereof was originally given, and which, by the action of the Brooklyn special term and the order to show cause, is now here to be heard, two questions are presented: 1. Can a fair and impartial trial be had in Kings county? And 2. If it cannot, to what county shall the place of trial be changed?

Apart from the positive testimony of many affidavits contained in the moving papers, showing that the condition of public feeling in the county of Kings is such as to make the obtainment of an impartial jury therein impossible, and the partial admission, at least, of the truth thereof, which the service of the amended complaint, designating the county of New York as the place of trial, implies, it is apparent, from the prominent positions of the parties concerned in the charges, the very wide and continued discussion of the matters involved by the public press for a period of over two years, a long and exhausting trial of the action of *Tilton* agt. *Beecher*, held in the city of Brooklyn, continuing six months, its proceedings reported day by day in the public press, read by every one, and continually and with feeling discussed, such trial resulting in the disagreement of the jury, and the various ecclesiastical investigations also duly chronicled by the press, that the obtainment of a fair, impartial and intelligent jury in the county of Kings would be an impossibility. In addition to this, a trial, had upon the very spot of the difficulties, surrounded by the warm and bitter partisans of both parties, whose feelings would be made known in the court room and elsewhere, and the comments of the press to be read by the jury, would be so influenced by outside surroundings and influences as to make the jurors sharers in those feelings and partisans in the struggle, rather than calm and impartial searchers for truth.

Manifestly then, to my mind, the trial should not take

place in the city of Brooklyn, and the motion for a change of the venue was fully justified. There is another reason, also, which is to me a very controlling one in determining to change the place of trial, and that is that the plaintiff has written, or caused to be written, from time to time, in the newspapers, very elaborate and carefully prepared communications to establish the alleged immoral conduct and life of the defendant. It is but fair to the plaintiff to assume that these articles were written and published for the express and only purpose of inducing the public to believe in the guilt of Mr. Beecher. To think otherwise, and to ascribe to the plaintiff no motive whatever in such publications, is to insult his intelligence by supposing that he would perform great labor and incur considerable expense for no purpose whatever. Many thousand copies of these papers were circulated in the cities of New York and Brooklyn, and it is but reasonable to believe that such communications have had more or less influence upon public opinion. If twelve intelligent men can be found in the county of Kings, who can, as jurors, try the issues in this action with freedom from previously formed opinions, then they exist in spite of the efforts of the plaintiff, who certainly, if he has not sought to influence the result of this particular action, has at least endeavored generally to mold public sentiment against the defendant in connection with the alleged transactions out of which this action springs. It does not become a party who has done this to say: "My efforts have been ineffectual and produced no effect." It certainly is not unjust to hold that a cause should not be tried in a locality the general sentiment of which one of the parties to the action has sought, by appeals through the public press, to control, and which he has himself selected as a place of trial. The fairness of a trial should be above and beyond suspicion, and no court should allow a trial by a jury of a vicinage the general opinion and belief of which, upon the matters involved in such trial, either party has industriously, through newspapers, sought to form. To do this would

simply encourage parties, in advance of actual trial, to create prejudice and bias, in the hope of benefit to follow from a legal investigation before men, some of whom, at least, might have obtained their views and judgments of a cause elsewhere than in the court room. The administration of justice should be subjected to no such hazard, and the party who is inconvenienced by a determination that it shall not be, can only blame the indiscretion which induced him to submit his case to the general public, with all possible art and skill, in advance of its legal presentation in the mode and manner established by law. The proper guarding of a trial by jury requires a change of the locality fixed by the plaintiff. If a fair and impartial one can be had in the locality selected by the plaintiff it is a contingency only, and exists in spite of efforts to the contrary, to the hazard and uncertainty of which no cause should be subjected (*People* agt. *Webb*, 1 *Hill*, 179; *People* agt. *Long Island R. R. Co.*, 16 *How.*, 106–111).

In the selection of a place of trial for this action other than that of Kings county, the fact that the plaintiff has already, by the service of an amended complaint, transferred it to the city of New York has not been overlooked. As already stated, such selection cannot influence this motion any more than an offer upon the argument to locate it there could do. When notice of the present motion was given the place of trial was Kings county. That motion could not be in any way prejudiced by the amended complaint. It gave to the court full discretion to fix the place of trial; and to allow the motion to be presented and argued as if the venue was now in the city and county of New York and the effect was to change it from that place to another, would be to give to the amended complaint a force which the section of the Code allowing it expressly forbids. When the law fairly commits a discretion to the court, neither party can, by his action, take it away, and for this reason the action of the plaintiff in amending his complaint cannot succeed.

In fixing a place of trial for this cause in some locality other

than the county of Kings, one manifest objection to New York exists in the fact that its courts are now burdened to an extent which makes the trial of this, if not impossible, at least unjust and unfair to other litigants. Whilst this action would be dragging its weary way for an indefinite period, interests involving millions would remain undisposed of. Issues actually arising in the great commercial metropolis, and which must be tried in its courts — vital, too, to parties — would tarry and wait for months, whilst one not arising therein, and properly triable elsewhere, was occupying the attention of its courts. This ought not to occur, and justice to others, if not to these parties themselves, who could only reach this cause in a very long period of time, must prevent the selection of New York as the place of trial.

Apart, however, from the reason just given, every argument against the county of Kings applies to New York. It is there where the great daily papers, which so largely give tone and color to public sentiment, are printed and published. The trial of this cause at that great center — more, even, than in Brooklyn — would draw and attract public attention and surround it with influences antagonistic to calm inquiry and judicial investigation. Here, too, are the very papers which the plaintiff chose as his spokesmen to the public. Its population is the very population which he addressed, whose opinions he sought to form and whose sentiment he sought to direct. Separated only by a river, with the residents of one very largely the business men of the other, with interests and business and social ties very closely intertwined, New York and Brooklyn make substantially a single community, and every argument against the one as the place of trial of this action, applies with equal force to the other, and hence the former cannot be chosen as the place of the trial for this action.

In changing the locality of trial it may cause inconvenience to witnesses to go into one of the rural counties, but I am also satisfied that very many who would be examined, were

such trial either in New York or Brooklyn, can, without injury to the merits of the cause, be safely left at home. To every lawyer the fact is obvious, that trials are oftentimes uselessly protracted by the examination of witnesses whose evidence, which the court cannot legally exclude, weighs not a feather in the scales of justice. In a country circuit, with the cause stripped of unnecessary witnesses, the action could be readily disposed of in a few weeks, and thus great expense saved. It could be tried, too, before a jury intelligent and impartial, who, during such trial, would not be subjected to the influences which would focalize around one conducted upon the spot and scene of the transactions, and which influences exist amid that teeming population, continually stimulated by the appeals of partisans and of the daily newspapers, as they do nowhere else. There is no occasion, however, to subject parties and witnesses to useless inconvenience and expense by compelling them to attend at any extremity of the state. The New York daily papers circulate in Franklin county as well as in those more contiguous to the city. From my knowledge of the state, I incline to the opinion that the county of Delaware will afford as fair and impartial a trial as any other. That county is, therefore, fixed as the place of trial, subject, however, to the designation of some other, upon proof of any fact, now unknown to me, which renders the selection of some other more desirable. The attorneys of the defendant will prepare the proper order for settlement, and upon such settlement the suggestions of either party as to the place will be heard and determined.

N. Y. COMMON PLEAS.

MARKS RINALDO agt. FREDERICK HAUSMANN.

Specific performance — when will be decreed.

Specific performance will be decreed, although there were unsatisfied liens on the premises when the title was to be closed, if at that time the holders of the liens attend, with the vendor, ready and willing to satisfy their liens simultaneously with the closing of the title.

All that a purchaser can claim is that when he parts with his money he shall receive the title subject only to such liens as he agreed to assume, and when the holders of other liens are in attendance to discharge them simultaneously with the passing of the title he will, upon completing the agreement on his side, get what he bargained for.

Morange agt. *Morris* (3 *Keyes*, 48; *S. C.*, 32 *How.*, 178) reviewed and held to be in conflict with the later case of *Hinckley* agt. *Smith* (51 *N. Y.*, 21).

Special Term, November, 1876.

ON the 26th day of January, 1876, the plaintiff entered into a contract with the defendant for the sale of certain premises in the city of New York, at the price of $26,000, to be paid as follows: $2,000 upon the signing of the agreement, $6,000 by assuming a mortgage upon the premises, and $18,000 in cash on the 15th of February, 1876, when the deed was to be delivered. There were mortgages on the premises amounting to $20,000; and on the day fixed for passing the title the defendant attended at the place designated, with his money, and the plaintiff was ready with his deed, and had procured the attendance of the mortgagees, who were ready upon the receipt of the amounts due them respectively, to surrender their mortgages and execute satisfaction-pieces thereof.

The defendant having refused to accept the deed and pay the purchase-price, this action was commenced for a specific performance. The defense interposed is the existence of the mortgages.

Jacobs & Sink, attorneys, and *Albert Cardozo*, of counsel, for plaintiff.

Culver & Wright, attorneys, and *J. W. Culver*, of counsel, for defendant.

VAN BRUNT, *J.*—I am aware that the language of the court in the case of *Morange* agt. *Morris* (3 *Keyes*, 48), sustains the defendant's position in this case. The court says that "it is the duty of the seller to have the mortgages discharged before the time arrived at which he had stipulated to convey."

The laying down of so broad a principle was not necessary to a decision of that case.

The case of *Hinckley* agt. *Smith* (51 *N. Y.*, 21), is a much later authority, and is in direct conflict upon this point with the case of *Morange* agt. *Morris*.

The case of *Hinckley* agt. *Smith* lays down the rule that the seller must be in a position at the time he is to convey, and upon the receipt of the purchase-price, to deliver just the title he has agreed to convey.

In the case at bar the evidence shows that if the defendant had shown any inclination to take the title there would have been delivered to him simultaneously with the payment of the purchase-price, satisfaction-pieces of the mortgages about which complaint is now made.

I do not think any purchaser can require more than that he shall receive, when he parts with his money, a deed conveying the premises to him, together with releases of all claims which he has not assumed.

I am therefore of opinion that the plaintiff having been in

a position to have satisfaction-pieces of this mortgage delivered to the defendant simultaneously with the payment of his purchase money, has done all he was required to do, and is entitled to a decree for specific performance.

Judgment accordingly, with costs.

SUPREME COURT.

AMOS F. HATFIELD *et al.* agt. FREDERICK A. MACY and EDWARD MILLER.

New trial — Newly discovered evidence — Surprise.

To furnish adequate ground for a new trial, on the ground of "after discovered evidence," the same must have been discovered since the trial, and have been out of the parties' power, by diligence, to have been discovered before.

The want of recollection of a fact, which by due diligence and attention the party might have remembered, is not ground for a new trial.

In order to the granting of a new trial on the ground of *surprise*, the material point, in respect to which the surprise is alleged, must have been of a nature that it could not have been anticipated, and there must have been no want of skill, care or attention.

MOTION for new trial on the ground of surprise and newly discovered evidence.

W. Watson, for motion.

A. R. Dyett, opposed.

VAN VORST, *J.* — On the ground of newly discovered evidence, this motion cannot be granted. The fact that the defendant Miller, one of the sureties on the original undertaking, had been excepted to, and that a new undertaking had been given, signed by the defendant Macy and Christian F. A. Dambman, was known to the attorney for the defendants at the time. The defendant Macy must have known it, as he signed both undertakings. The defendant Miller, according

to his affidavit, takes no interest whatever in the matter, and has authorized no proceedings to be taken on his behalf.

The evidence, which is claimed to be new, has not, therefore, been discovered since the trial.

Perhaps the fact in regard to the exception to Miller as surety had been forgotten by both the defendant Macy and his attorney; no allusion being made to such fact in the defendants' answer, nor on the trial, it may be reasonably inferred that these facts had faded from their memory.

To furnish adequate occasion for a new trial on the ground of "after discovered" evidence, the same must have been discovered since the trial, and have been out of the parties' power, by diligence to have been discovered before (*Williams* agt. *Baldwin*, 18 *John.*, 489; *Oakley* agt. *Sears*, 7 *Robt.*, 111).

The want of recollection of a fact, which by due diligence and attention the party might have remembered, is not ground for a new trial (*Fleming* agt. *Hollenbeck*, 7 *Barb.*, 271; *Chamberlain* agt. *Lindsay*, 1 *Hun*, 231).

Upon these authorities, the defendants are not entitled to a new trial on this ground.

The well recognized rule in regard to granting relief on the ground of "surprise" is equally fatal to the defendants.

In order to the granting of a new trial on the latter ground, the material point in respect to which the surprise is alleged must have been of a nature that it could not have been anticipated, and there must have been no want of skill, care or attention.

The court "will not relieve a party from the consequences of mere ignorance, inadvertence or neglect" (*Hilliard on New Trials*, 521).

From nothing that transpired on the trial would it appear that the defendants or their counsel were at all surprised.

The defense now claimed to exist in their favor, although the facts upon which it rests was known to them, was not even hinted at by the defendants or their counsel on the trial

On the other hand, as the case shows, the defendants upon the trial "admitted the execution of the undertaking." Such admission, it must be assumed, was made at the time in good faith, and without any ulterior object. But the admission was acted upon by the counsel and the court.

The defense was put upon the distinct ground that this action could not be maintained, on account of the alleged pendency of the appeal in the court of appeals undetermined, and the matters growing out of such appeal and the orders staying proceedings.

The granting of a motion for a new trial rests in the sound discretion of the court. And when I take into consideration that Dambman, the surety on the second undertaking, and who, it seems, was under obligation to indemnify and save harmless the defendant Macy from the judgment, nearly two months after it was recovered, actually paid the judgment, and the same at his request has been satisfied; and that at the time he paid it he was informed, on the behalf of the plaintiffs' attorneys, of the fact that the action had proceeded upon the wrong undertaking, as was claimed by Mr. Watson, and he making no objection to payment on that account; and the further fact that the defendant Miller is practically a stranger to these proceedings, and has not authorized this application, I must conclude that no real injustice or hardship is suffered, and that upon neither of the grounds urged should a new trial be granted.

The motion for a new trial is denied, with ten dollars costs.

SUPREME COURT.

ELISHA HURLBURT, BRADFORD R. WOOD and JOHN KIRKPATRICK agt. A. BLEECKER BANKS, Mayor of the City of Albany, WILLIAM N. S. SANDERS, Chamberlain of the City of Albany, and MARTIN DELEHANTY, Clerk of the Common Council of Albany.

Constitutional Law — Injunction to restrain municipal officers — proper parties.

Where the title of an act fairly and reasonably announces the subject, and that is a single one, if the various parts thereof have respect or relate to that subject, it is a compliance with the provision of the Constitution, that "no local or private bill shall embrace more than one subject, and that shall be expressed in its title" (*state Constitution, art. 3, sec. 16*).

The scope, the object of the bill need not be stated in the title, but the "subject," *i. e.*, the thing legislated upon, must be disclosed, and the act can embrace only that one. What the act proposes to do with the "subject" need not be stated in its title, nor the machinery to be put in operation disclosed. It is enough if the subject of legislation be stated.

The general subject of local improvements includes not only the plan and construction of contemplated work, but the means by which the work may be accomplished, the proceedings necessary to be adopted for assessing and paying the expenses, and the remedies to parties for redress of grievances arising out of their construction.

Held, therefore, that the act entitled "An act in relation to that portion of the Great Western turnpike road, commonly known as Western avenue, lying between Snipe street, in the city of Albany, on the east, and the west line of the proposed new boulevard, intersecting the said road west of Allen street, in the said city, on the west" (*chap. 445, Laws of 1876*), is not in violation of said constitutional provision, and an injunction restraining the issuing of bonds pursuant to its provisions will not be granted.

Held, second, that the act, although it provides that the assessment, which is to be made upon the owners of property fronting upon the avenue,

shall be made as prescribed in certain other laws therein referred to, is not in conflict with the provision of the Constitution which declares that "no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed to be a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act" (*state Constitution, art.* 3, *sec.* 17).

Held, third, that the provision of the Constitution which declares that "the legislature shall not pass a private or local bill in any of the following cases: * * * Laying out, opening, altering, working or discontinuing roads, highways or alleys, or for draining swamps or other low lands" (*state Constitution, art.* 3, *sec.* 18), does not apply to this case. That provision refers to the ordinary "roads, highways or alleys," the manner of opening, working, altering or discontinuing of which can be readily provided for by general law.

Held, fourth, that the act is not obnoxious to any objection founded upon *article* 3, *section* 20 *of the state Constitution*, because it fails "to distinctly state the tax." It does state the tax; it cannot exceed $185,000.

Held, fifth, that the act does not contravene the provision of *article* 8, *section* 11 *of the state Constitution*, which declares, "no county, city, town or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become, directly or indirectly, the owner of stock in, or bonds of any association or corporation, nor shall any such county, city, town or village be allowed to incur any indebtedness, except for county, city town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid and support of its poor as may be authorized by law." The debt to be paid or liability to be extinguished in this case is not that of the individual taxpayers, but of the municipality.

Since the act of 1872 (*Laws of* 1872, *chap.* 161), which gives to a resident and tax-payer the right to bring an action *to prevent* waste or injury to any property, fund or estate of such county, town or municipal corporation, such resident tax-payer has also a remedy by injunction against officers of a municipal corporation who are proceeding under an act authorized by statute, which statute is repugnant to any constitutional provision restraining them from doing the wrongful act.

Although the act of 1872 allows an action to be brought against officers of a municipal corporation who are about to do wrongful acts, it has not repealed other statutes, nor declared that they are the only necessary parties to such action.

This action is brought by the plaintiffs as residents and tax-payers of the city of Albany, against the defendants, the mayor, the chamberlain and the clerk of the common council of the city of Albany, to restrain them

from issuing bonds of the city of Albany to the amount of $185,000, pursuant to the provisions of chapter 445 of the Laws of 1876, which provides for the improvement and ornamentation of certain roads and avenues leading to Washington park.

Held, that there is a defect of parties; that a proper adjudication and determination of the rights of all interested in the subject-matter of this action, require the city of Albany and the board of park commissioners should be made defendants, and the injunction asked for should therefore be refused.

Ulster Special Term, November, 1876.

Motion by plaintiffs to restrain the defendants from issuing bonds of the city of Albany to the amount of $185,000 — pursuant to the provisions of chapter 445 of the Laws of 1876.

Messrs. Wood, Lawson & Moak, for plaintiffs.

Messrs. Colvin, Hale & Barnes, for defendants.

Westbrook, *J.*— This cause, most elaborately and carefully argued, presents questions of unusual interest, and it is a source of regret that the pressure of very many official duties and the need of a speedy determination, prevent a more diligent and lengthened examination than is possible for me to bestow upon it.

The plaintiffs are residents and tax-payers in the city of Albany, and may, if the allegations of the complaint are well founded, bring an action of this character under the provisions of chapter 161 of the Laws of 1872, entitled "An act for the protection of tax-payers against the frauds, embezzlements and wrongful acts of public officers and agents." The express language of that statute gives an action "*to prevent* waste or injury to any property, funds or estate of such county, town or municipal corporation by any person residing in such county, town or municipal corporation assessed for and liable to pay taxes therein, or who has paid taxes therein within one year previous to the commencement of any such

action or actions." As the remedy given is a preventive one, it seems to me that the very pith and object of the law are destroyed if it be construed simply to give a tax-payer a standing in court, and yet hampered by old decisions, holding that an injunction to restrain illegal acts cannot issue. An act authorized by statute which statute is repugnant to any constitutional provision, is a "wrongful" one; and as the law of 1872 confers upon a resident tax-payer the right "to prevent" such act, it is not perceived why such legislative provision has not swept away the cases which hold an injunction not to be an appropriate remedy (*See Ayers and others* agt. *Lawrence and others*, 50 *N. Y.*, 192). It is true that if the act of 1876 be unconstitutional, it is possible that a defense may exist as to each bond when an attempt is made to enforce it, and yet such a course would lead to such a multiplicity of actions, so much cost, expense and trouble, and be, also, owing to recent decisions of the supreme court of the United States, when the bond prosecuted should be in the hands of a *bona fide* holder capable of suing in the federal courts, so uncertain in result, that it is safer and better to hold, as is now held, that the plaintiffs, if the theory of their action is correct, have this remedy.

The next question which this motion presents is, are the proper parties defendant before the court? The decision of the matters involved in this action undoubtedly concerns the city of Albany and the board of commissioners of the Washington park. The former is interested not only in the improvement which the act contemplates, but its bonds are those sought to be enjoined. The defendants are its officers charged with the duty of such issue, but they have no personal interest in the question. If issued, the proceeds are to be used in making a city improvement, and the city alone is responsible for their payment. What is true of the city is also true, varying in details, of the park commissioners. They are charged with the duties of caring for the park, constructing its approaches and making the particular improve-

ment which the act contemplates. The proceeds of the bonds are to come into their hands to be used for that purpose. If the injunction is granted, its effect is manifestly to stop and arrest a public work in which the city and the park commissioners are chiefly concerned, and it would seem to be but reasonable that they should have their day in court to be heard upon questions which affect them, and in which their agents, now alone prosecuted, have no interest. It is true that the act of 1872, already referred to, allows an action to be brought against officers of a municipal corporation who are about to do wrongful acts; but whilst it allows them to be prosecuted, it has not repealed other statutes, nor declared that they are the only necessary parties to such action. Sections 118 and 122 of the Code are still in force. As, to use the exact language of the latter section, "a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in" (*Code, sec.* 122; *People* agt. *Law*, 34 *Barb.*, 494, 509; *Allen and others* agt. *Turner and others*, 11 *Gray*, 436). These parties clearly are the city of Albany and the board of park commissioners. Individuals may also be interested, but not directly so as to make them necessary parties. For whatever grievances or rights they may have, they must look to the corporation in which they dwell. If any have contracts with the city or the park commissioners, they must seek their remedy there. Contractors who expect their compensation, or persons who look for payment for damages sustained, out of a particular fund belonging to the individual with whom they made the contract or who has done them an injury, are certainly not proper parties to an action which affects a fund or means not theirs, and out of which they only expected to be paid. And so, also, if particular persons dwelling upon the avenue desire the work to proceed, their dealings and remedies must be with and against the city and park commission. To a greater or less extent, what is true of them is also true of every other tax-payer and resident

of the city, each one of whom has more or less interest in the work, and the making of all parties would be simply impossible. All such are represented by the city, and if that be made a party, their rights are properly represented.

Having reached the conclusion that the act of 1872, and the provisions of the Code are not inconsistent, and that a proper adjudication and determination of the rights of all interested in the subject-matter of this action, require the city of Albany and the board of park commissioners should be made defendants therein, it would follow that the injunction asked should be refused. If, however, the plaintiffs are right in the general objects sought to be attained, they should not be defeated upon this technical ground, but an opportunity should be afforded to bring in all who are interested. To the real merits of the action, then, the opinion will now be addressed.

The act — action under which is sought to be restrained — is chapter 445 of the Laws of 1876, and is entitled, "An act in relation to that portion of the Great Western turnpike road, commonly known as Western avenue, lying between Snipe street, in the city of Albany, on the east, and the west line of the proposed new boulevard, intersecting the said road west of Allen street, in said city, on the west." The act allows the turnpike company to convey to the park commissioners the portion of the road to which, in its title, it refers, but forbids it being closed, or the exclusion of the public from its use as a highway. It then places the grading, improvement and ornamentation thereof, in charge of the park commissioners, to be paid for, in the first instance, by the issue and sale of the bonds of the city of Albany, which issue is sought to be enjoined. It then provides for the payment of the principal of the bonds, by assessment upon the owners of the property fronting upon the proposed avenue, and out of the city at large, in case the fund obtained for that purpose from the owners of the property shall be insufficient; the city at large, until the maturity of the bonds, providing

for and paying the interest. It is claimed by the plaintiffs that this law is unconstitutional and void for various reasons, which will be presently stated.

Preliminarily to a discussion of the constitutional questions involved, it should be stated that Washington park, in the city of Albany, was authorized to be established by chapter 582 of the Laws of 1869. Various acts have been since passed which are amendatory and supplementary thereto, by which (*chap.* 377, *Laws of* 1870; *chap.* 45, *Laws of* 1872) approaches, among other things, could be made to the park, and streets already open selected and taken for that purpose. That portion of the turnpike road which the act of 1876 refers to, had, previous to such act, and the recent constitutional amendments, been taken possession of by the park commissioners, and partially improved, under a lease executed by the turnpike corporation, which corporation has existed for many years.

It is said that the law of 1876 is in conflict with article 3, section 16 of the Constitution of this state, which declares: "No private or local bill which may be passed by the legislature, shall embrace more than one *subject*, and that shall be expressed in the title." It being conceded, as it certainly must be, that the act in question is "*local*," it is argued that the bill does embrace more than one "subject," and that that is not "expressed in the title." In determining this question, the exact word used, "subject," must be borne in mind. The scope, the object of the bill, need not be stated in the title; but the "subject," *i. e.*, the thing legislated upon, shall be disclosed, and the act can embrace only that one. If it can be shown that the law covers more than one "subject," one thing, it is obnoxious to the objection made. What the act proposes to do with the "subject" need not be stated in its title, nor the machinery to be put in operation therein disclosed. It is enough if the "subject" of legislation be stated. Webster, in his definition of the word "subject," uses two quotations to illustrate its meaning: "This

subject for heroic song;" "Make choice of a *subject*, beautiful and noble, which * * * shall afford an ample field of matter, whereon to expatiate." The author of an essay, or lecture, in choosing and announcing his "subject," does not ordinarily declare, in its title, his proposed treatment thereof, but he simply states upon *what* he is to write or speak; and he who would know more must read or hear what is written or spoken upon that topic. Precisely this the framers of the Constitution had in mind. The "subject" of the bill should be expressed in the title, and that should be a single one, and he who wishes to know more, and to learn what is done must read the body of the bill; his attention is to be drawn to the "subject" by the title; he is not to be deceived by legislation upon any other than the one so indicated, and if he then fails to use his senses he, alone, is deceived.

This view of the constitutional provision is not a strained or novel one. In *Matter of Ferdinand Meyer* (50 *N. Y.*, 504) the court of appeals held: "If the title of an act, fairly and reasonably announces the subject, and that is a single one, and if the various parts thereof have respect or relate to that subject, the provision of the Constitution that no local or private bill shall embrace more than one subject, and that shall be expressed in its title (*state Constitution, art.* 3, *sec.* 16), is complied with. The degree of relationship of each provision is not material if it legitimately tends to the accomplishment of the general purpose. The general subject of local improvements includes not only the plan and construction of contemplated work, but the means by which the work may be accomplished, the proceedings necessary to be adopted for assessing and paying the expenses, and the remedies to parties for redress of grievances arising out of their construction.

And in *People* agt. *Briggs and others* (50 *N. Y.*, 553–562), CHURCH, chief justice, says: "In an act in relation to Lake avenue it would not be competent to insert provisions

respecting Mount Hope avenue. As to such a bill, Lake avenue would be the subject. So in a bill in relation to education in the city it would be improper to insert provisions in relation to street or police, unless they were in some way legitimately connected with the subject of education."

Cases to the same effect can be multiplied indefinitely (*See, among others, People* agt. *Willson*, 60 *N. Y.*, 507–509; *People* agt. *Dudley*, 58 *N. Y.*, 323; *Harris* agt. *People*, 59 *N. Y.*, 599–602; *In the matter of Volkenning*, 52 *N. Y.*, 650; *People ex rel.* agt. *Havemeyer*, 47 *Howard*, 494–509).

An examination of the act of 1876 will, we think, show that it relates to but one subject, and that is the avenue, and the particular part thereof referred to in the title. It is that which is to be conveyed, graded and improved; it is upon that which the money to be raised is to be expended, and every section and clause concerns this single subject. It is true that all which the law requires to be done to the avenue is not stated, nor the machinery devised for that purpose disclosed in its title, but the whole of it relates to such avenue as the "subject" to and upon which legislation is directed. It is the "subject" thereof (to borrow an illustration from the medical profession), as much as the person or body to be operated upon by the surgeon may be said to be his. The first objection cannot therefore prevail.

It is further objected, that as the act of 1876 provides that the assessment which is to be made upon the owners of property fronting upon the avenue shall be made as prescribed in certain other laws therein referred to, it is in conflict with article 3, section 17 of the Constitution, which declares: "No act shall be passed which shall provide that any existing law, or any part thereof shall be made or deemed to be a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act."

It is true, as defendants' counsel urge, that it does not necessarily follow if the part of the act of 1876 which makes

this provision for the assessment is invalid, that the whole act is, therefore, also void. It was so held in *The People* agt. *McCann* (16 *N. Y.*, 58), and *People* agt. *Green* (58 *N. Y.*, 295). According to these cases, the remainder of the act might stand, even though the part which makes provision for the assessment should fail, provided such part is not so identified with the general scheme of the enactment that its elimination therefrom would not overthrow the plan. The act is perfect, without these provisions, to authorize a conveyance of the road, to direct its improvement, to issue the bonds, and to provide for their payment by general taxation; but it is also apparent that the payment of the whole debt by the city at large was not contemplated by the law. On the contrary, the principal thereof is to be paid by owners of lots fronting on the road. This is a controlling feature of the statute, and if that is held invalid, it is obvious that the method of paying the cost of the contemplated improvement is destroyed, and by force thereof the general scheme of the act defeated. If this objection, then, be well founded, it reaches the entire law, and must be so discussed. To meet the point fairly, we ask: Does the Constitution mean that when a charter to a city has been given, and the mode and manner of taxation for municipal purposes defined, that a special law subsequently passed, authorizing money to be raised for a specific purpose, and then providing that the same shall be assessed, levied and collected in the manner provided in the law giving the charter, that such act is void? Such a statute certainly does not, by its express terms, "provide that any existing law, or any part thereof, shall be made or deemed a part of said act," nor does it "enact that any existing law, or any part thereof, shall be applicable." It is a law perfect to authorize a tax, and one which, without declaring any other law "a part thereof," in fact, or "applicable" thereto, simply provides that certain well known and understood modes and forms of assessment which the city possessed shall be used to obtain the money. If such an enactment is void, our session

laws must be incumbered to an extent which can scarcely be conceived. The clause of the Constitution which we are considering should, when no apparent evil follows from so doing, have a strict reading, and not be strained beyond its exact words, which seem to me only to cover those cases in which, by the express language of the act, some other is made a part thereof, or is directly declared to be applicable thereto. The case with which we are dealing certainly presents no evil within the spirit of the provision. It fixes a sum of money to be raised by a loan, directs the mode of its expenditure, and when providing for the payment, refers to certain laws as the mode and manner of assessment. If the legislature should create a right of action where none before existed, and should then declare that the mode and manner of procedure should be that prescribed by the Code, it could scarcely be claimed that such act was void, because the whole Code, containing several hundred pages, was not re-enacted section by section. The case put is the one before us. The machinery for taxation was devised and prescribed by the charter. A new tax is imposed, and the manner of its assessment and collection is declared to be that given by the charter. Is it void? Should the charter again be re-enacted section by section, and must this be repeated again and again for all succeeding years whenever the city needs a special act? And must the same reasoning apply to every village, city, town and county in this state, and to the state itself, when money is to be raised by tax for any purpose whatsoever? It must, if the plaintiffs are right. "*Argumentum ab inconvenienti plurimum valet in lege*" is a maxim which applies with great force to the affirmative of these positions. Cases may be supposed in which the application of this constitutional provision would be wise and salutary. If a city is chartered, the provisions relating to that of another should not be declared to be a part thereof, or applicable thereto, and many others of a similar character may be called to mind. But, with the machinery of taxation applicable to a locality once

provided, no reason is seen making it necessary, when a tax is imposed for any purpose, to re-enact every provision as to its assessment and collection. No such requirement is reasonable, and not only the inconvenience of such a rule, but its impossibility when applied to practical legislation, compel us to hold that this law is not void on account of the objection we have just considered.

It is further urged that article 3, section 18, of the Constitution applies, which declares that, "the legislature shall not pass a private or local bill in any of the following cases. * * * Laying out, opening, altering, working or discontinuing roads, highways or alleys, or for draining swamps or other low lands."

Is this part of Western avenue, which had, previous to the act of 1876, and this constitutional amendment, been selected as an approach to the park, and already leased to the park commissioners, either a road, highway, or alley, in the sense these words are used in the Constitution? It is a highway, undoubtedly, in a general sense, but it can scarcely be deemed one of these of which the Constitution speaks. That refers to the ordinary "roads, highways, or alleys," the manner of opening, working, altering or discontinuing which can be readily provided for by general law. No general law applicable to this case can be passed; and it is manifest as the same section subsequently provides, that "the legislature shall pass general laws providing for the cases enumerated in this section," that this clause of the Constitution cannot, and does not, prevent a special act being passed in relation to a road leading to or passing through a park of any city, the provisions of which must always be in accordance with the particular plan in each case.

Neither is the law, in my opinion, obnoxious to any objection founded upon article 3, section 20 of the Constitution, because it fails "to distinctly state the tax." It does state the tax; it cannot exceed $185,000. It does not, it is true, require the commissioners of the park to expend

the whole of that sum, but they must use so much as the work authorized shall cost. Must an appropriation in every case state with precision the exact cost of the work to be done; and if it fails so to do is the law void? What this law declares in words, every other, directing money to be raised for a particular purpose, does practically, without so declaring. Only so much, in any event, of an appropriation made can be legally expended as the object proposed costs. More than this is illegal, though not so expressly enacted in the law, and I fail to see that an expression in language of a thought which must always, in a similar case, be understood without expression, can avoid the law which so specifically declares.

It is also argued that article 8, section 11 of the Constitution is contravened by this act. That provision declares: "No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become, directly or indirectly, the owner of stock in, or bonds of any association or corporation, nor shall any such county, city, town or village be allowed to incur any indebtedness, except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid and support of its poor, as may be authorized by law."

The reasoning employed is as follows: It is the duty of the persons owning property upon the avenue to bear the cost of the improvement — it is their debt — and while the act recognizes this by requiring them in the end to pay it, the city advances for them the money in the first instance, and then at the end of five years receives back the amount from them without interest. The same argument would invalidate every law which authorizes any "county, city, town or village" to borrow money for any purpose. The objector would argue, the tax-payers of such "county, city, town or village" should pay this money which is to be raised by a debt created by the municipality — it is their debt —

and, and therefore, the credit of such municipality is loaned to individuals, who then only pay after a lapse of years, instead of paying immediately what they owe. The error of the reasoning is in the premise. Neither in the case before us, nor in the one supposed, is the debt to be paid or liability to be extinguished, that of the individual tax-payers, but of the municipality. The corporate body in the end only discharges its own obligations by a tax upon its tax-payers, assessed either locally or generally, and in such proportions as the law shall provide. If in this case the city of Albany compels a locality to pay the principal of the loan, and the entire community the interest, neither the credit of the municipality nor its money has been loaned, for it has in the first place but paid its own liabilities, and then apportioned the debt it has incurred in so doing among the various tax-payers as the law provided. The original work upon the road was done for the city, the liabilities therefore were its liabilities, and the bonds to be issued are to be so issued to extinguish its own indebtedness. The assessment to be made upon owners of property fronting upon the avenue is simply a tax upon them to pay the city indebtedness, levied upon them in a larger proportion than others, because they are more benefited than such others by the improvement. The fact that they pay a larger share of the city debt incurred in the improvement of the avenue, makes them no more original debtors for the work than other tax-payers, who likewise bear a portion of the burden, though in a less degree, because by the original expenditure of the corporation they were less benefited.

We have now examined in detail the various objections which have been made to the act of 1876, and are constrained to overrule them all. It is a grave responsibility for any court to hold that a law passed in accordance with the forms of the Constitution is invalid because in its provisions it violates that instrument. That duty would not, however, be evaded in a clear case; but such an one is not, in our judgment, now before us. On the contrary, whilst the questions

are interesting and novel, we think that no part of the fundamental law has been violated, either in its letter or spirit, With the objects and purposes of the act we have been considering, and the policy thereof, we have nothing to do. These questions belong to the legislative department of the government. When that has only exercised its constitutional prerogatives, it cannot be interferred with, because courts differ from it as to the policy of legislation. If the law is unwise, impolitic and burdensome, though not unconstitutional, the legislature must correct it. Courts are powerless.

The injunction asked for is refused, with ten dollars costs of motion.

NOTE.—By consent of counsel, as an order granting or refusing an injunction is not appealable to the court of appeals, a mandamus commanding the issue of the bonds was granted by judge WESTBROOK at special term. This order was immediately affirmed *pro forma* at general term and an appeal at once taken to the court of appeals, which latter court has just (December, 1876) affirmed the conclusions reached in the foregoing opinion as to the constitutionality of the law, which was the subject of litigation.—[REP.

N. Y. SUPERIOR COURT.

AUGUSTE STRUPPMAN *et al.* agt. AUGUSTE MULLER *et al.*

Partition — infant parties — security by guardian — discharge of purchaser at a sale by referee.

Before the statute (*Laws of* 1852, *chap.* 277) was enacted, an infant could not maintain an action for partition at all; under it whether the infant sue alone or be joined as co-plaintiff with other parties in interest, the conditions of the statute must be strictly complied with, upon which the privilege of maintaining the suit is accorded to the infant.

It is irregular to institute proceedings in partition on behalf of an infant, without first obtaining the authority of the court.

The mere joinder with such infant of a tenant in common, as co-plaintiff, will not dispense with the necessity, on the part of the infant, of obtaining the authority to sue, which, under the statute, is a condition precedent to the maintenance of the action; or authorize a decree of sale, except under the conditions which the statute imposes.

Partition will not be ordered upon the application of an infant, unless it be made satisfactorily to appear that the interests of the infant require such partition or sale.

An action of *partition* cannot be prosecuted by or in behalf of *an infant* as plaintiff without the appointment by the court of a *next friend*, pursuant to the act of 1852.

It is erroneous to allow an infant in proceedings in partition, to act by guardian without security.

Persons having adverse or conflicting rights in relation to the subject-matter of a litigation ought never to be joined as complainants.

It seems doubtful whether a person claiming interests in the property adverse to that of the infant, such as a right during his life to the rents and profits of land to which they are entitled in remainder, or an interest in the enforcement of an equitable lien upon that land, may join them as co-plaintiffs with himself in a suit to enforce his own right and remedies in *these* respects, and as their guardian *ad litem*, may prosecute such suit, in his own behalf, to a decree in his own favor, impairing or divesting them of their title for the purpose of establishing his own.

Struppman agt. Muller.

Where the rights and interests of infants are involved, purchasers at judicial sales will be discharged from their purchases, where reasonable doubt exists as to the validity of the title thereby acquired.

Special Term, December, 1876.

ADAM MULLER died seized of certain real estate in the city of New York, leaving a will, by which he devised to his four children, Maria, wife of Charles Struppman; Bertha Muller, Auguste Muller and Louis Muller, his real estate. After testator's death, Bertha married Thomas H. Young, one of the defendants. Maria Struppman died after her father, leaving her husband and three children, all of whom are infants, her surviving; the husband, Charles Struppman, and his three infant children are the plaintiffs. The said infants, by their father, presented a petition to the justices of the superior court, stating among other things, that it will be necessary for the petitioners and they are about to commence an action against J. C. Julius Langbein, Auguste Muller and Louis Muller for the recovery of one-fourth of the real estate of Adam Muller, deceased, "and which is in the possession and held from them by the parties to be made defendants." (Langbein was the administrator *de bonis non*, &c., of Adam Muller; Auguste and Louis Muller were infant children of Adam Muller, deceased.) Upon the above petition the plaintiff, Charles Struppman, was appointed guardian *ad litem* of the above named infants, and authorized to prosecute for them the action mentioned in the petition. No further leave was asked or obtained from the court, on the part of the infant plaintiffs to commence and prosecute the action; no bonds were given by the guardian *ad litem* of any of the infants. The complaint sets out the interests of the several parties in the real estate of Adam Muller, and prays judgment that the title to or interest in the real estate of the plaintiffs and the several beneficiaries under the will, and the parties to the action, may be declared and fixed, and that the plaintiffs' share in said property might be assigned to

them and partition made of the same and possession given to them. The cause was tried and findings and judgment made and entered fixing the interests of the several parties to the action, and directing the sale of the premises by the referee, Ray Hamilton, esq., and the payment and distribution to the several parties of their respective shares, as found in the findings and decree. The notice of sale was published twice a week for three weeks. The premises were sold July 21, 1876, in several parcels. A. & F. Stern became the purchasers of a house and lot on Fourth street.

The purchasers Stern objected to the title on the grounds:

That the court never acquired jurisdiction of the parties or of the action.

The petition upon which the order of the court was made, appointing a guardian *ad litem* of the infant plaintiffs to prosecute the action, did not set forth or contain the facts required by law.

No proceedings were had, by reference or otherwise, to ascertain the truth of the facts set out in the petition, or as to the necessity for a partition, as required by law.

The order appointing the guardian *ad litem* of the infant plaintiffs, did not require, nor did the guardian make or give a bond to the infants.

That the notice of sale was insufficient, with other objections not considered in the decision.

A motion was made on the part of the purchasers A. & F. Stern to be relieved from their purchase and to have the ten per cent paid by them to the referee refunded, &c.

William Miller, another purchaser at the sale, also objected to the title upon grounds somewhat similar to the above, and a motion was made to relieve him from his purchase. Both motions came on to be heard September 22, 1876.

James Wiley, attorney, *Albert Cardozo*, of counsel, for A. & F. Stern.

Brownell & Lathrop, for purchaser Miller.

George F. & J. C. Julius Langbein, for administrator, &c.

L. H. Rowan, for defendant Young.

Charles Goldzier, of counsel, for plaintiffs.

SANFORD, *J.*— This action has been instituted and prosecuted apparently for the purpose, and certainly with the effect, of partitioning and selling the real estate of infant plaintiffs, in disregard of the prohibitions and provisions of chapter 277 of the Laws of 1852, entitled "An act in relation to the partition of lands" (4 *Edm. Stat. at Large*, 615). No cause of action in favor of the infant plaintiffs, other than for the partition of real estate in which they are alleged to have an undivided interest, is set forth in the complaint, or is established by the findings or the judgment of the court. In an order preliminary to the suit, whereby their father was appointed their guardian *ad litem*, he was authorized to prosecute an action, on their behalf, for the recovery of an interest in real estate alleged to be in the possession of and to be withheld from them by certain persons who are made parties defendant; but the suit, as actually commenced and prosecuted by him on his own behalf, as well as on theirs, was of a different character, and, as appears from the allegations of the complaint and the prayer for relief, involved an adjudication of the respective rights and interests of all the parties in and to the land constituting its subject-matter, an assignment, apportionment and partition of such rights and interests, and finally, as appears by the record of judgment, a sale of the premises and a distribution of the proceeds thereof among the parties, according to their respective shares, as thus adjudged and determined. I am of opinion that the court had no authority or jurisdiction thus to direct

the partition and sale of the real estate of infants, at their own instance or in a suit instituted in their behalf, except by virtue of and in accordance with the requirements of the statute above cited; nor, indeed, at the instance of or in a suit instuted by other parties in interest, unless such infants were joined with such parties either as co-plaintiffs — in compliance with the conditions and in accordance with the requirements of the statute — or were brought before the court, by the due service of process, as parties defendant, appearing and being represented as such in the manner prescribed by law. Before the statute was enacted, an infant could not maintain an action for partition at all; under it, whether the infant sue alone or be joined as co-plaintiff with other parties in interest, the conditions must be complied with upon which the privilege of maintaining the suit is accorded to the infant. The mere joinder with such infant of a tenant in common as co-plaintiff cannot dispense with the necessity, on the part of the infant, of obtaining the authority to sue, which, under the statute, is a condition precedent to the maintenance of the action, or authorize a decree of sale, except under the conditions which the statute imposes. It is obvious, from an inspection of the record, that in the conduct of this suit in behalf of the infant plaintiffs, the statute has been wholly disregarded, and that none of its requirements have been observed. Proceedings for the partition and sale of the real property of the infant plaintiffs were never authorized by the court prior to the commencement of the suit, nor does the record show that it was made to appear satisfactorily to the court that the interest of the infants required such partition or sale. No next friend to conduct the proceedings on the part of the infant plaintiffs was ever appointed, nor was the security ever given or required which the statute exacts. These irregularities and defects have, in numerous cases, been held fatal to the jurisdiction, and purchasers under judicial sales have frequently been discharged on these grounds (*Clark* agt. *Clark*, 14 *Abb.*

Pr. R., 299; *Lansing* agt. *Gulick*, 26 *How. Pr. R.*, 250; *Jennings* agt. *Jennings*, 2 *Abb. Pr. R.*, 6; *Onderdonk* agt. *Mott*, 34 *Barb.*,106). If it be asserted that a cause of action, other than for a partition of the real property which forms the subject-matter of the suit, is averred and established on behalf of the plaintiff, Charles Struppman, Sr., and that the jurisdiction of the court to maintain an action on his behalf and to render a judgment in his favor for the sale of the premises cannot be questioned; this proposition does not involve, as an incident, the propriety of joining with him, as co-plaintiffs, his infant children, in contravention of the statute, for the purpose of effecting the partition and sale of their real estate; and it may well be doubted whether, claiming as he does interests in the property adverse to theirs, such as a right, during his life, to the rents and profits of land to which they are entitled in remainder, or an interest in the enforcement of an equitable lien upon that land, he may join them as co-plaintiffs with himself in a suit to enforce his own rights and remedies in these respects, and, as their guardian *ad litem*, may prosecute such suit, in his own behalf, to a decree in his own favor, impairing or divesting them of their title for the purpose of establishing his own.

Only parties who are united in interest may be joined as plaintiffs or defendants (*Code*, *sec.* 119). In this case, the infant plaintiffs had no interest in obtaining the relief demanded by their father. They were in no respect profited by the establishment of his tenancy by the curtesy, or in the enforcement of an equitable lien for his benefit. Their interests, in these respects, were rather adverse to his. It may well be that, in so far as there was a conflict, their rights would have been more effectually protected through the intervention and agency of a different guardian *ad litem* and a separate attorney. Had they been made parties defendant, they would have at least had opportunity to litigate, and to submit their rights to the protection of the court under the form of an issue by answer. Persons having adverse or con-

flicting rights in relation to the subject-matter of a litigation ought never to be joined as complainants (*Grant* agt. *Van Schoonhoven*, 9 *Paige*, 255). It may well be doubted whether infants thus joined, and represented only by their co-plaintiff, as guardian *ad litem*, whose interests are adverse to their own, are before the court or within its jurisdiction in such sense as to be bound by a decree, the purport of which is to impair or divest their title to land, or to effect a sale in partition of their real estate. It is the established practice to discharge purchasers at judicial sales where reasonable doubts exist as to the validity of the title thereby acquired, and the completion of such sales is enforced with great caution in such cases if the rights and interests of infants are involved.

It is worthy of remark that many of the orders and proceedings in the suit appear to have been made upon the consent of the parties, and it is well settled that no consent on behalf of infants can warrant or impart validity to judicial action.

Under all the circumstances, I think the purchasers' application to be discharged should be granted, and that the adult plaintiff should be required to pay the costs and expenses incurred in examining the title.

None of the objections above considered were urged or presented in a like application heretofore made by another purchaser under the same decree.

SUPREME COURT.

JOHN J. DECKER and another agt. MYRON A. DECKER and another.

Trade mark — when injunction to restrain the use of a person's own name as a trade mark will not be allowed.

A defendant will not be restrained by injunction from the use of his own name, which he has caused to be registered and recorded as a trade mark in the patent office, on motion of a plaintiff by the same name and engaged in the same business, unless it plainly appears that it was obtained for the purpose of deception, or with a view to mislead the public or injure the plaintiff.

It seems doubtful whether in a collateral proceeding the court is empowered to restrain a party from the use of a trade mark, awarded to him in the established course of procedure, by the commissioner of patents.

Where the answer and affidavits of defendants thoroughly and completely deny the whole equity of plaintiff's case, as set forth in their complaint and affidavits, and thoroughly rebut all charges of evil intent and improper design in obtaining the trade mark, an injunction will not be granted.

It seems that it is improper to grant a preliminary injunction, except in cases where the injunction is absolutely necessary for the protection of the plaintiff's rights and the furtherance of justice.

New York, Chambers, November, 1876.

J. D. Townsend, for plaintiffs.

Wm. J. A. Fuller, for defendants.

LAWRENCE, *J.* — In the case of *Meneely* agt. *Meneely* (62 *N. Y.*, 427) the court of appeals held that a person cannot make a trade mark of his own name, and thus debar others having the same name from using it in their business; and, also, that every man has the absolute right to use his own

name in his own business, even though he may thereby interfere with and injure the business of another bearing the same name, provided he does not resort to any artifice, or do any act calculated to mislead the public as to the identity of the establishments, and to produce injury to the other beyond that which results from the similarity of the name.

In this case the plaintiffs have for a long time been engaged in business, in the city of New York, as manufacturers of piano fortes, under the firm name of Decker Brothers; and these pianos have, as their complaint alleges, and as their affidavits show, acquired much celebrity. The defendants have been in business since 1871, in the city of New York, as manufacturers of pianos, under the firm name of Decker & Barnes; but it also appears that they are both men of long experience in the business, and that the defendant, Myron A. Decker, was for a long time a manufacturer of pianos in this city, prior to 1871, under the firm name of Decker & Co.; and he claims that his pianos were known in the trade as the Decker pianos, long before the plaintiffs acquired a reputation as the manufacturers of pianos. Many of the best known manufacturers corroborate the defendant Decker's allegations and state that they have known his piano as "the Decker piano, or piano forte," for many years.

It appears that the defendants have caused to be registered and recorded, as a trade mark, in the patent office, "*The Decker Piano.*"

The plaintiffs seek to enjoin and restrain the defendants from the use of this trade mark, and claim that it was obtained for the purpose of misleading and deceiving the public, and is an artifice or device calculated and intended to induce purchasers to believe that the defendants are solely entitled to use the name of Decker, and that the pianos manufactured by the defendants are the pianos of the plaintiffs.

While it may be true, under the decision in the case of *Meneely* agt. *Meneely* (*supra*), that the defendants are not

entitled to a trade mark such as they have obtained, I cannot, after a careful examination of the voluminous papers read upon this motion, hold that it was obtained for the purpose of deception, or with a view to mislead the public or injure the plaintiff, nor in the face of the affidavits read in support of the defendants that it is calculated to mislead the public.

It is very doubtful whether, in a collateral proceeding of this character, the court is empowered to restrain a party from the use of a trade mark, awarded to him in the established course of procedure, by the commissioner of patents.

The answer of the defendants and the affidavits read on their behalf, so thoroughly and completely deny the whole equity of the plaintiff's case as stated in their complaint and affidavits, and so thoroughly rebut all charges of evil intent and improper design in obtaining the trade mark, as to render it impossible for the court to say, upon a mere motion, that the defendants have injured the plaintiffs.

It is an elementary principle that, where the whole equity of the complaint is denied, an injunction will not be granted (*American Grocer Pub. Assn.* agt. *Grocer Pub. Co.*, 51 *Howard, p.* 402, *and cases cited; Finnegan* agt. *Lee*, 18 *How.*, 186 *and* 187; see, also, the remarks of HARRIS, *J.*, in *Bruce* agt. *Del. and Hud. Canal Co.*, 19 *Barb., p.* 379, as to the impropriety of granting a preliminary injunction except in cases where the injunction is absolutely necessary for the protection of the plaintiff's rights and the furtherance of justice).

For the reasons above stated, I am of the opinion that the motion for an injunction *pendente lite* should be denied, with costs.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* MARGARETTA WEATHERHEAD agt. CORNELIUS A. WALDRON, surrogate, &c., *et al.*

Surrogate — jurisdiction, how and when acquired.

The statute requires that before any surrogate shall take any proceedings to try any issue raised upon the probate of a will, he shall cite all persons interested to appear before him; but there is nothing in the statute to indicate that after he has obtained jurisdiction by the service of a citation upon *some* of the persons interested, that that jurisdiction shall not continue until the proceedings are terminated.

The service of a citation upon one of the parties interested, gives to the surrogate issuing it, if regularly issued, jurisdiction of the proceedings until completed.

It is not necessary, in order that a surrogate should acquire jurisdiction to try the question of *inhabitancy*, that citation should be issued and served upon *all* the parties entitled to notice of the propounding of a will for probate and proceedings had upon the return day of such citation.

The surrogate of the county whose citations were *first* issued and served upon a proper application being made, acquires jurisdiction to try the question of *inhabitancy*.

Where the will of deceased had been presented for probate to the surrogate of the county of New York, said surrogate by the issuance and service of citation upon one of the interested parties having acquired jurisdiction to try the question of the residence of deceased, afterward a certain other paper purporting to be the last will and testament of deceased was presented for probate to the surrogate of Saratoga county, and thereupon the said surrogate issued citation to the heirs at law and next of kin of deceased, and on the return day, upon objection being made to his jurisdiction, on the ground, among others, that deceased was at the time of his death a resident of the county of New York, which objection was overruled by said surrogate, and he proceeded to try the question of the residence of deceased; whereupon a writ of prohibition was issued out of this court, prohibiting the surrogate of Sara

toga county from proceeding in the matter of the probate of said will. On demurrer to the return:

Held, that the return to the writ of prohibition was insufficient unless it contained a *positive* allegation that the deceased resided in Saratoga county at the time of his death.

Special Term, November, 1874.

Albert Cardozo, for plaintiff.

Ira Shafer, for defendant.

VAN BRUNT, *J.*—This is a demurrer to a return made by the surrogate of the county of Saratoga and Hilon L. Weatherhead to a writ of prohibition issued out of this court, upon the ground of the insufficiency of said return.

It appears from the said writ and the return thereto, that Edmund L. Weatherhead died on the 25th of April, 1874, leaving a certain paper writing, purporting to be his last will and testament, and in and by which the relator was named as one of the executors thereof. This will, the relator, claiming that the deceased was at or immediately previous to his decease a resident and inhabitant of the city and county of New York, presented for probate before the surrogate of said county, on the 8th day of May, 1874.

The said surrogate issued a citation to Hilon L. Weatherhead, returnable on the 26th day of May, 1874, which citation was duly served, and upon the return day thereof Hilon L. Weatherhead appeared before said surrogate and filed a notice of appearance and of an intention to oppose the probate of said will, and also filed an affidavit that there were persons who were entitled to notice of the probate of said will, who had not been cited to appear.

The surrogate thereupon adjourned the proceedings to the 24th of June, 1874, and issued a further citation returnable on said last mentioned day, for the purpose of bringing in such other persons.

After this time, the said Hilon L. Weatherhead presented for probate to the respondent, as surrogate of Saratoga county,

a certain other paper writing purporting to be the last will and testament of said deceased, in which the said Hilon L. Weatherhead was named his executor.

That thereupon the said surrogate issued a citation to the heirs at law and next of kin, requiring them to attend the probate of said will on the 22d day of June, 1874, which citation was served upon each and all of the heirs at law and next of kin of the deceased.

That upon the return day of said citation, the relator, Margaretta Weatherhead, appeared by her proctor, and objected to the jurisdiction of the surrogate of Saratoga county, on the ground among others, that the said Edmund L. Weatherhead, was at the time of his decease a resident of the county of New York.

That the said surrogate overruled said objection, and proceeded to try the question of the residence of the deceased.

That the proponent having adduced his testimony, the proceedings were adjourned to the 8th day of July, 1874, to enable the relator to obtain and produce witnesses upon her behalf.

That on the 24th day of June, 1874, further proceedings were had before the surrogate of New York, before whom the said Hilon L. Weatherhead appeared, and it being shown that there was still a party who was entitled to notice and had not been served with a citation, the surrogate further adjourned the said proceedings to the 14th day of July, 1874.

On the 7th day of July, 1874, a writ of prohibition was issued out of this court, prohibiting the surrogate of Saratoga from proceeding in the matter of the probate of said will.

The surrogate of Saratoga county and the said Hilon L. Weatherhead, for a return to said writ of prohibition, set forth the proceedings herein before stated, as having taken place before him and that it appeared from the proceedings had before him, that the said Edmund L. Weatherhead, was a resident of the county of Saratoga, at or immediately previous to his death.

The objection to the sufficiency of this return is that it does not allege, as a fact, that Edmund L. Weatherhead resided in the county of Saratoga, at the time of his death.

It was not contended upon the argument of this demurrer, that such an allegation was necessary to make the return sufficient, unless the surrogate of the county of New York, had obtained jurisdiction to try the question of the residence of Edmund L. Weatherhead at the time of his death. And it seemed to be conceded that if he had acquired such jurisdiction, that such an allegation was requisite.

I am unable to agree with the position taken by the counsel for the respondent, that in order that a surrogate should acquire jurisdiction to try the question of inhabitancy that citation should be issued and served upon all the parties entitled to notice of the propounding of a will for probate, and proceedings had upon the return day of such citation.

I can see nothing in the requirements of the statute which would militate against, or is inconsistent with a construction of the statute, which would give to the surrogate of the county, whose citations were first issued and served, upon a proper application being made, jurisdiction to try the question of inhabitancy.

It is true that the statute requires that before any surrogate shall take any proceedings to try any issue raised upon the probate of a will, he shall cite all persons interested to appear before him; but there is nothing to indicate that after he has obtained jurisdiction by the service of a citation upon some of the persons interested, that that jurisdiction shall not continue until the proceedings are terminated.

In fact, if such was not the natural construction to be placed upon the provisions of the statute in respect to the probate of wills, it would seem to be necessary that such a construction should be adopted, unless plainly antagonistic to its requirements.

Upon a question as to whether one judicial tribunal or another had obtained jurisdiction to try a given question,

there should be no ground for uncertainty. And unless there is some good reason shown from the statute itself, all rules of construction would require that that interpretation should be given to it, which would make it designate the precise point at which jurisdiction commenced and ended.

If any other construction is adopted than that, the surrogate who has first issued his citation, which citation has been served upon at least one of the parties interested, should obtain jurisdiction, it is difficult to know when such jurisdiction would be obtained before the trial and submission of the question to the surrogate for decision.

The result of the last named construction would necessarily lead to confusion and conflicts between the surrogates of the various counties of this state, and they would be unable to tell when they had acquired exclusive jurisdiction of the matter to be submitted to them for decision.

I am of the opinion, therefore, that the construction of the statute that the service of a citation upon one of the parties interested, gives to the surrogate issuing it, if regularly issued, jurisdiction of the proceedings until completed, being most in accordance with the practice in all judicial proceedings, should be adopted as to the statute now under consideration, as there is nothing in that statute antagonistic to such a construction.

It follows, therefore, that the surrogate of the county of New York, by the issuance and service of the citation as above mentioned, obtained jurisdiction to decide the question of the inhabitancy of Edmund L. Weatherhead at the time of his death, and that the surrogate of Saratoga county had no right to attempt to try that question.

The return, therefore, to the writ of prohibition is insufficient unless it contains a positive allegation that the said Edmund L. Weatherhead resided in Saratoga county, at the time of his death.

The return now under consideration containing no such allegation, is insufficient, and the demurrer must be sustained.

SUPREME COURT.

MARGARET N. PECK agt. GREY C. HOTCHKISS and others.

Answer of another suit pending.

It is a good answer to an action for seizing property under an attachment, that the suit in which the attachment was issued is still pending; and this, though the plaintiff's complaint in the attachment suit was dismissed, if an appeal from the judgment of dismissal has been duly taken, and the appeal be pending undetermined.

Special Term, December, 1874.

DEMURRER to answer.

Niles & Bagley, for plaintiff.

Payne & Lewis, for defendants.

VAN VORST, *J.*— As a principal ground of the plaintiff's cause of action, it is averred, in the complaint, that the action in which the attachment was issued, under which the plaintiff's property was seized, was dismissed in the court out of which the attachment issued, with costs, and that judgment was rendered in favor of this plaintiff, who was the defendant in the attachment suit.

The defendants, however, in their answer to the complaint herein, while they admit that such judgment of dismissal was rendered in the attachment suit, allege that they have, within the period prescribed by law, duly appealed from said judgment to the general term of the court, and have executed and filed the proper undertaking required on such appeal, and that said appeal is still pending and is undetermined.

The pendency of such appeal is matter proper to be set up as a defense to this action. For it may be that the judgment appealed from may be reversed, and it may yet be determined in the action that the same was maintainable, and the attachment properly and legally issued and levied.

The plaintiff having based her cause of action upon the seizure of her property under the attachment, until it be formally adjudicated, in the action in which the attachment was issued, that the plaintiffs therein had no cause of action against the plaintiff in this suit, and no valid ground for the issuance of the attachment, their proceedings cannot be called unlawful in taking the property in question under the process in that action.

The plaintiff's cause of action becomes complete only when final judgment is rendered in his favor in the attachment suit. But with an appeal pending the judgment of dismissal cannot be considered final, nor the action to be ended. Nor can we try here, for the purposes of this action, the merits of the suit in which the attachment was issued; nor give them any available consideration as long as that action is undetermined.

There should be judgment for the defendant on the demurrer, with costs.

SUPREME COURT.

MARY E. LOCHLIN agt. SANDY CASLER.

Costs — discontinuance without costs in action tried before referee.

The plaintiff brought his action to recover damages and abate a nuisance. The cause was referred by consent. The referee failing to render his decision within the time allowed by statute, defendant's attorney served notice on plaintiff's attorney ending the reference, whereupon the plaintiff made a motion on affidavits showing a partial success on his part, for leave to discontinue without payment of costs:

Held, that in view of all the facts and motives of the parties in prosecuting and defending, plaintiff should be allowed to discontinue without costs of the prosecution and trial, on payment of ten dollars costs granted the defendant for opposing the motion.

Herkimer Special Term, 1876.

ACTION to recover damages and abate a nuisance. The case by consent of parties was referred. A trial was had before the referee; he allowed the time for making his report to expire, not having decided the matter, alleging as a reason for such delay that he did *not know* how to decide the case. Defendant's attorney served on plaintiff's attorneys a notice ending the reference, and thereupon a motion was made on part of the plaintiff for leave to discontinue the action without payment of costs. Other material features of the case appear in the opinion of the court.

Motion to discontinue without costs.

Link & McEvoy, for motion.

H. Clay Hall, opposed.

HARDIN, *J.*—The action is most clearly on the equity side of the court, and therefore the costs are within the discretion of the court (*Code, sec.* 306). The case, doubtless, was close upon the merits or the referee would not have hesitated and held his decision. The affidavit read on the motion shows a partial success by the plaintiff, as some of the matters complained of have been abated by the voluntary act of the defendant. This appears by an affidavit not denied by the defendant. This fact must be considered upon the question of good faith, and, taken in connection with the other facts brought out on this motion, it must lead to the conclusion that the action was instituted in good faith by the plaintiff and prosecuted in good faith. It may be assumed the defense was put in in good faith, and would be conducted in good faith, until a decision upon the merits.

This application to discontinue must be disposed of in the light of all the facts, and the motives of the parties in prosecuting and defending the action. Courts do not favor the prosecution or defense of actions merely for costs.

The conclusion is reached that the plaintiff should be allowed to discontinue this action upon payment of costs, ten dollars, of opposing this motion, and without costs. Let an order be entered accordingly.

NOTE.—This case is somewhat novel in some of its features. The plaintiff would seem to have succeeded to a certain extent, as appears by his affidavit on this motion; some of the matters complained of having been abated by the voluntary act of defendant since the suit was brought. But for the singular action of the referee for which he certainly offers a reasonable excuse, though a somewhat novel and unusual one, *i. e.*, *his want of ability to decide the case*, the result to the plaintiff might, perhaps, have been somewhat different. — [REP.

SUPREME COURT.

FRANCIS D. MOULTON agt. HENRY WARD BEECHER.

Costs — extra allowance.

It is sufficient, under section 309 of the Code, to entitle a defendant to an extra allowance (although he had not answered when the cause was discontinued), that he had appeared and defended by interposing a demurrer.

Where the plaintiff succeeded upon the demurrer, the defendant having done nothing more in the cause than to appear and obtain extensions of the time to answer, a moderate fee only should be granted, and this because the plaintiff, by commencing his action, rendered the employment of counsel necessary.

A motion for an extra allowance must be made before the final adjustment of costs (*Rule* 56).

At Chambers, December, 1876.

MOTION by defendant for an extra allowance of $2,500, or five per cent on amount claimed as damages.

The action was commenced by plaintiff in the county of Kings to recover of defendant the sum of $50,000 for alleged malicious prosecution. The place of trial was subsequently changed on application of defendant, by a decision of judge WESTBROOK, to Delaware county, whereupon the plaintiff discontinued his action.

Roger A. Pryor, for plaintiff.

Thomas G. Shearman, for defendant.

BRADY, *J.* — The motion for an extra allowance in this action was pending when the bill of costs was served, and the defendant's attorney insisted that the costs, if to be paid,

would be received only on condition that this proceeding should not be prejudiced. It is true that the representative of the defendant's attorney then stated that he paid them unconditionally and left the money, which was appropriated, but there was no adjustment of the costs in accordance with the rules of the court, and there was no meeting or unison of minds which made the payments so absolute as to subject the defendant to the fifty-sixth rule of this court requiring the motion for an allowance to be made before the final adjustment of costs. The next and remaining question is, therefore, what amount of allowance should be given? I entertain no doubt that this is a proper case for an allowance under section 309 of the Code, or that the circumstances attending the prosecution are sufficient to justify, nay to require, some indemnity. The defendant had not answered when the cause was discontinued, it is true, but he had appeared and defended. He had interposed a defense by demurrer, and this was, I think, sufficient under section 309. The plaintiff succeeded upon the demurrer, both at special and general terms, however; and the only labor performed in the cause therefore on the part of the defendant, of which this court can take notice, is that involved in the arguments at special and general terms. This labor, it seems, was unnecessary and subjected the plaintiff to delay and expense. The result is that the defendant has appeared in the action and done nothing more, except to obtain extensions of the time to answer. The action was one of great importance to the parties, it is true, and if it had continued would doubtless have involved many serious complications, but these would have been formidable only at the trial or in its preparation. The cause had not reached that stage, as already suggested, when it was discontinued; there was, indeed, no issue. Under the circumstances I think a moderate fee only should be granted. This should be given because the plaintiff, by commencing this action, rendered the employment of counsel necessary. I think $250 should be allowed.

SUPREME COURT.

JOHN B. ROE agt. SILAS ELMENDORF, GEORGE BROWER and GARRETT NEWKIRK, Commissioners of the town of Hurley, Ulster county.

Highways — duty of commissioners — their liability for damages for injury from bridge built across highway by railroad company.

It is the duty of commissioners of highways of towns to keep in repair the highways of the town, and as they and the inhabitants of the town are empowered to raise the necessary means for such purpose, in an ordinary case of a highway out of repair, and injuries resulting therefrom, the town through its commissioners should be held responsible.

A *railroad company* organized under the general statute of this state is required in *crossing a highway* to restore the highway thus crossed to its former state, or to such state as not necessarily to impair its usefulness.

And where it becomes necessary for such company to dig a *trench* across a highway for the construction of its railway, which is *bridged* to keep up the highway, the railroad company are bound to *continue such bridge in repair* as long as the highway exists, and the corporation is allowed to enjoy the lawful exercise of its franchise. The duty in such case must be an *ever continuing one.*

The remedy against commissioners of highways of a town depends upon their neglect of duty, and where the law had permitted a railroad company to excavate the highway, so that it needed to be bridged, and had also imposed upon such corporation the duty of keeping such bridge in repair, the neglect of which duty by the company, and not neglect by the commissioners, caused the injury, *held,* that the commissioners were not responsible. In such case the liability of the town ceases.

Held, also, that the act of 1855, entitled "an act to enlarge the powers and duties of commissioners of highways" (*chap.* 255 *of Laws of* 1855), which enables the commissioners to sue and recover such damages as the town is compelled to pay by reason of the non-performance of duty of a railroad company, does not alter or increase their responsibility, so as to render them liable for damages, where they were not so liable, previous to the passage of this act.

It seems, however, that where commissioners of highways have been, as in this case, exceedingly remiss in the discharge of their official duties, there is a remedy against them by trial and punishment by indictment.

Ulster Circuit, October Term, 1876.

Before justice T. R. WESTBROOK.

D. M. Dewitt, for plaintiff.

A. Schoonmaker, Jr., & F. L. Westbrook, for defendants.

AT the close of the testimony in this cause, which was an action to recover the value of a pair of horses killed whilst hauling a load of stone over a bridge upon a public highway in the town of Hurley, which bridge had been erected by a railroad company across a trench dug by them through such highway for a railroad crossing, and which bridge broke down by the weight of the team and load, the defendants' counsel moved for a nonsuit, the argument of which was concluded at the hour of adjournment on October 10, 1876. The facts upon which such motion depended, and the grounds thereof, sufficiently appear in the oral opinion pronounced.

At the opening of the court on the morning of October 11, 1876, WESTBROOK, J., said: I have given to the questions which were so ably discussed yesterday all the examination which the intervening time has enabled me to do. I will state the conclusions reached, which, it may not be improper also to say, are in accordance with views formed by examination whilst at the bar.

As it is the duty of commissioners of highways of towns to keep in repair the highways of the town, and as they and the inhabitants of the town are empowered to raise the necessary means for that purpose, I never could see any good reason why the town, through its commissioners, should not be responsible for injuries caused by any public road being out of repair. Every argument which reached and con-

trolled the case of *Hyatt* agt. *The Trustees of the Village of Rondout* (44 *Barbour*, 385, *affirmed* 41 *N. Y.*, 619), it seems to me, is applicable to the case of commissioners of highways. The trustees of the village of Rondout were simply commissioners of highways with reference to the streets, and the privileges which it (the village, the corporation) received from the state were not so largely in advance of those conferred upon a town as to hold the former liable for injuries caused by the want of repairs to a highway, while the latter was not. The town, as a village, holds out inducements to the public to use its roads, and the obligation to furnish such as are safe is as strong in the one case as in the other. Were this, then, the ordinary case of a highway out of repair and injuries resulting therefrom, I should hold the defendants, as the representatives of the town, liable. This I also understand to be the spirit of the most recent cases (*See, among others, Hover* agt. *Barkhoof*, 44 *N. Y.*, 113).

But this cause presents another question. The injuries of which the plaintiff complains were caused by the act of another corporation, the R. & O. R. R. Co., which, acting under authority of law, disturbed the bed of the highway, digging and cutting across it a deep trench, and then bridging the trench. It is exceedingly doubtful whether the legislature could impose upon a town the burden of restoring the road to its original condition. So to hold is almost equivalent to permit me to do an act injurious to a highway, and then compel another, at his own cost, to repair it. It is scarcely worth while, however, to discuss this question. Such a duty has not been devolved upon the town. The law requires the corporation which it has allowed to disturb the bed of the road to restore it as near as possible to its original condition. This requirement is not fulfilled by supplying a *temporary* track where a permanent one before existed, and then allowing it to go to pieces, but only by keeping it up so that it can be continually used. I am not prepared to say that when a road bed has been taken up by a railroad company, and the

earth and stone restored to their old position, that there remains any further obligation to be discharged by the corporation, but I do say that when a trench has been dug across a highway for the construction of a railway, which is bridged to keep up the highway, that restoration, in the railway act, must mean a continual repair of such bridge, for the way is not restored to its old state so long as a dangerous place, caused by the railroad company, exists upon it. The duty in every such case must be an ever continuing one, and hence I fully agree with the reasoning of judge MILLER, in *People* agt. *Troy & Boston R. R. Co.* (37 *Howard*, 427). As the remedy against the commissioners of highways of a town depends upon their neglect of duty, and as in this case the law had permitted a railroad company to excavate the road so that it needed to be bridged, and had also imposed upon such corporation the duty of keeping it in repair, the neglect of which duty by the company, and not neglect by the defendants, caused the injury, it follows that the defendants are not responsible in this action, unless some other statute has made them so. This conclusion is sustained by cases determined in Massachusetts. In that state, by statute, the towns are liable for injuries sustained by a highway being out of repair. When, however, it is made the duty of a railway company to make such repairs, it has been held that the liability of the town ceases (*Inhabitants of Cambridge* agt. *Branch R. R. Co.*, 7 *Metcalf*, 70; *Sawyer* agt. *Inhabitants of Northfield*, 7 *Cushing*, 490; *see pages* 496, 497, 498).

It is claimed, however, that the act of 1855, entitled "An act to enlarge the powers and duties of commissioners of highways" (*chapter* 255 *of Laws of* 1855), has created a new liability on the part of the commissioners. First. Because it is made by such act the duty of the commissioners of highways to prosecute a company which fails to fulfill its obligations to the public in respect to the highway it disturbs, and compel the performance thereof, which duty being unperformed in this case, the defendants are liable. Second. That

the same act gives the commissioners of highways a remedy against the corporation for all damages it is compelled to pay by reason of a road being out of repair, and that is a recognition of the liability of the town for such damages as this plaintiff has sustained. A word upon each: Assume that an action will lie against a public officer for a mere neglect of duty (a very questionable proposition at least), what damages can be recovered? They certainly can be no other than those which the law can say directly followed and flowed from the neglect. If it was the duty of the defendants to have repaired the defective bridge which caused the accident complained of, we could say that such neglect caused the injury; but if it was not their duty to make the repairs, and all that they could do was to put in operation the legal machinery to compel others so to do, how can it be said that the failure to take such legal proceedings caused the accident, or that taking them would have prevented it? The result of a full and entire performance of duty by the defendants is unknown. It might, owing to no fault of theirs, have entirely failed; or, if successful in the end, and pursued with all the rapidity of which legal machinery is capable, it might not have accomplished any result in time to arrest the accident. There is, then, no such connection between this alleged neglect of duty, in the failure to prosecute, and the accident, as to enable either the court or jury to declare that such neglect caused it, or that full performance would have prevented it.

It is true that the act of 1855, as claimed by plaintiff's counsel, enables the commissioners to sue and recover such damages as the town is compelled to pay by reason of the non-performance of duty by the railroad company, but it allows only such. The act may have been passed upon the assumption that a town might be liable to the party injured in a case like this, but it has not, in express terms, created any such liability. We have already, as we think, shown that no such liability exists; and ability to recover all damages a

town is *compelled* to pay does not enable it to recover those which it is *not* compelled to pay, nor does it create any new liability. The very title of the act, "An act to enlarge the powers and duties of commissioners of highways," forbids the thought that the commissioners are liable when they were not before. Their duties and powers are enlarged, but they are not made responsible for want of action in a case when the damages sustained are not necessarily attributable to such omission.

I see nothing in the act of 1855 which aids the case of this plaintiff. On the other hand, I do see in it a legislative recognition of the principle I have sought to maintain, and that is, that upon the railroad company was devolved the duty of erecting and maintaining the bridge crossing the trench which it had excavated; and that the duty of the defendants was not to erect or repair, but compel the corporation so to do, and as such neglect cannot be said to have caused the damages complained of, it follows that this action cannot be maintained.

Having, for the reasons stated, held that this action cannot be maintained, it still is proper to say that the defendants have been very remiss in the discharge of their official duty. Here was a bridge continually in use and dangerous, and yet, so far as this case shows, there was an entire neglect, by the defendants, to examine it. They contented themselves with notifying the railroad company to repair, and never inspected the bridge after the repairs were made. If I could see a necessary connection between this want of a proper discharge of duty and the accident, which I cannot, for the reasons previously given, I should not hesitate to hold them liable in this action. This, however, I cannot do; but I am equally clear that the facts of this case, as they now appear, would justify their trial and punishment by indictment.

Motion for nonsuit granted.

SUPREME COURT.

Moritz Pam agt. Frederick Vilmar.

Execution against the person — when will be vacated.

A defendant in an equitable suit is not liable to imprisonment or final execution unless it appears by the complaint that the cause of action is one which falls within section 179 of the Code, or where the court has upon an affidavit stating extrinsic facts, granted an order of arrest.

The uniting of a cause of action for which a defendant could be arrested, with one for which he could not, entitles him to have the execution against his person vacated and set aside. The union of the causes of action amounts to a waiver of the right to an arrest, and also to a waiver of a right to an execution against the person.

On a motion to vacate an execution against the person, the findings of the justice at special term cannot be considered for the purpose of upholding the execution. If the complaint does not show a right to arrest, or if it shows that such right has been waived by an improper blending of two causes of action, in the absence of an order of arrest, final execution against the person cannot be resorted to.

N. Y. Chambers, November, 1876.

J. L. Lindsay, for plaintiff.

C. Wehle, for defendant.

Lawrence, *J.* — The execution against the defendant's person cannot, I think, be sustained. This is an equitable suit, and was brought for the purpose of obtaining an injunction and a receiver and to recover the possession of the property specified in the complaint.

The cause was tried before a justice sitting at special term,

as an equitable cause, and the findings on which the plaintiff relies, as sustaining his right to an execution against the defendant's person, are stated to have been found at a special term of the supreme court, &c., held for the trial of equity causes, &c.

In an equitable suit the defendant is not liable to imprisonment on final execution unless it appears by the complaint that the cause of action is one which falls within section 179 of the Code; or where the court has, upon an affidavit stating extrinsic facts, granted an order of arrest. The complaint in this case does not appear to state a cause of action for which the defendant might have been arrested and no order of arrest was obtained. If I am in error in this conclusion, there is another ground upon which I am of the opinion that the defendant is entitled to have the execution against his person vacated and set aside, and that is this: Assuming the action to be for equitable relief and also for the recovery of the possession of property wrongfully converted by the defendant, it is quite clear that the plaintiff has united a cause of action, for which the defendant cannot be arrested, with one for which the defendant can be arrested. This union of the causes of action amounted to a waiver of the right to an arrest, and also to waiver of a right to an execution against the person (*Lambert* agt. *Snow*, 9 *Abbott*, 91; *Brown* agt. *Ashbough*, 40 *How.*, 245).

The argument contained in the plaintiff's brief, as to the alleged injustice of vacating the execution against the defendant's person, cannot be considered by me. The law must be administered in accordance with the course of judicial decisions and in conformity with the precedents.

If extrinsic facts existed which justified the arrest of the defendant, those facts could have been made to appear to the court, by affidavit, and an order of arrest would have been granted.

Such an order, unvacated, would have authorized the issuing of an execution against the defendant's person, upon the

return of an execution against his property unsatisfied (*Wood* agt. *Henry*, 40 *N. Y.*, 124).

The findings of the justice at special term cannot be considered for the purpose of upholding the execution against the defendant's person. If the complaint does not show a right to arrest, or if it shows that such right has been waived by an improper blending of two causes of action, as above stated, in the absence of an order of arrest, final execution against the person cannot be resorted to (*Wood* agt. *Henry*, 40 *N. Y.*, 124; *Corwin* agt. *Freeland*, 2 *Seld*, 560; *Lambert* agt. *Snow*, 9 *Abbott*, 91).

The motion to vacate the execution is granted, but without costs, and upon condition that no action shall be brought by the defendant for false imprisonment.

SUPREME COURT.

SAMUEL ABRAHAMS and others, executors, &c., agt. THEODORE CLAUSSEN and others.

Mortgage foreclosure — usury — extension of mortgage.

Where a mortgagor paid to the holder of the mortgage $100 in addition to the lawful interest to procure an extension of the time within which to pay the debt secured by the mortgage: *Held*, that the security given for the original debt was not impaired by such payment, but the amount so paid should be applied as a payment on the mortgage debt.

By the payment of $100 besides the lawful interest the mortgagor secured an extension of the mortgage for three years. The bond accompanying the mortgage required the interest to be paid semi-annually. In an action to foreclose the mortgage for default in the payment of an installment of interest which became due November 1, 1875: *Held*, that the extension of the mortgage did not postpone or extend the time to pay the interest, the time for such payment remained unaltered, and the action for foreclosure was properly brought.

Special Term, October, 1876.

ON the 21st of October, 1872, the defendant, Claussen, made his bond, whereby he promised to pay to the defendant Schlesinger the sum of $2,450, on November 1, 1874, with interest at seven per cent, payable semi-annually, on the first of November and May in each year; with the provision that should default be made in the payment of interest, and should the same remain in arrears for thirty days, the whole amount of the said bond should, at the option of the party of the second part, become and be due and payable; and, at the same time, Claussen executed to Schlesinger a mortgage on premises in Third street, near Avenue C, in the city of

New York, to secure the payment of the said bond; which mortgage contained the same conditions as the bond as to payment and default; which bond and mortgage was, on December 3, 1872, assigned by Schlesinger to one Fembacher, of whom the plaintiffs in this action are executors.

On November 16, 1874, Fembacher, the then owner of the bond and mortgage, received from the then owner of the property, one Joseph W. Smith (through one Fisher, his agent), $185.75; eighty-five dollars and seventy-five cents of this amount was to pay for the interest then due on the said bond and mortgage, and the balance $100, for extending the mortgage for three years — to November 1, 1877 — and said Fembacher delivered to him a paper, of which the following is a copy:

"Rec'd, New York, Nov. 16th, 1874, of Mr. F. S. Fisher, one hundred eighty-five 75-100, for interest up to the 1st of Nov., & value rec'd for extending the mortgage for three years to Nov. 1st, 1877.

100 for extending mortgage. W. FEMBACHER.
85.75 for interest.

185.75"

Default having been made in the payment of the *interest*, which became due November 1, 1875, the plaintiffs bring this action to foreclose, claiming that the whole amount of the bond and mortgage became due by reason of the default in the payment of said interest. The defendant Smith alone answered, and set up as a defense:

First. That by the payment of the $100, the bond and mortgage became void by reason of usury, in the receipt of said sum.

Second. That for the said $100, the said Fembacher had extended payment of the moneys secured by the bond and mortgage, until November 1, 1877.

On the trial, counsel for the plaintiff gave credit to the

defendant for the $100, on account of the principal money. Counsel for the defendants claimed that the extension of the mortgage also extended the time of the payment of interest, and that no action could be commenced for non-payment of either principal or interest until November 1, 1877, although default was made in the payment of the interest due November 1, 1875.

Joseph Bellesheim, attorney, *A. C. Anderson*, of counsel, for plaintiff. Cited *Real Estate and T. Company* agt. *Keech* (7 *Hun*, 253).

Ely & Smith, attorneys, *Moses Ely*, of counsel, for defendant Smith.

VAN VORST, *J.* — The case of *The Real Estate and Trust Company* agt. *Keech* (7 *Hun*, 253) is adverse to the defense of usury in this action. It is there held, that where a mortgagor paid to a holder of the mortgage $1,000 in addition to the lawful interest, to secure an extension of the time within which to pay the debt secured by the mortgage, that the security given for the original debt was not impaired by such payment, but the amount so paid should be applied as a payment on the mortgage debt.

By the payment of $100, besides the lawful interest, the mortgagor secured an extension of the mortgage for three years. It is claimed by the counsel for the mortgagor that the extension postpones the payment of interest as well as principal for the period named. I think this is a strained and unnatural construction. The bond accompanying the mortgage requires the interest to be paid semi-annually. The receipt for the payment of the $100 does not refer to the bond. I think the time for the payment of interest remains unaltered; and there being a default in the payment of an installment, according to the terms of the bond, the action for foreclosure is properly brought, and there should be judgment for foreclosure and sale.

N. Y. COMMON PLEAS.

ALEXANDER B. MOTT agt. THE CONSUMERS' ICE COMPANY.

Discovery — inspection of books and papers.

The books of a physician and surgeon and the entries contained therein, when made in a private and professional manner, containing information acquired by him in attending patients in a professional character, and which information was necessary to enable him to prescribe for such patients as a physician and to act as a surgeon, *are privileged* (2 *R. S.*, 671, *sec.* 112 [*6th ed.*]), and as such are exempt from an inspection or examination by an adverse party.

A *party* to an action may, at the instance of the *adverse party*, be compelled, by *subpœna duces tecum*, not only to appear at the trial and submit to a personal examination, but to produce books and papers in his possession precisely as any other witness may be so compelled.

It seems, that as the defendant in this case had his remedy by *subpœna duces tecum*, he was not entitled to ask the equitable interposition of the court for a discovery and inspection (*Affirming S. C., ante, page* 148).

General Term, January, 1877.

Before C. P. DALY, *Ch. J.*, ROBINSON *and* LARREMORE, *JJ.*

APPEAL from an order of Mr. justice J. F. DALY, denying a motion for an inspection of all of the books kept by the plaintiff for two years prior to the accident down to the present time.

Martin & Smith, attorneys, *A. P. Whitehead & S. Sidney Smith*, of counsel, for defendants, appellants, argued the following points:

I. "The evidence sought to be obtained is material."

The plaintiff, in his amended complaint, claims damages for loss of professional income, averring that prior to the

injury set forth in the complaint his income amounted to a certain sum and that subsequently it became less, and that such loss of income is attributable to the injury.

He also avers that his power of earning income has been lessened by the injury.

Now, the books are material for the purpose of enabling the defendants to show the court and jury that, in point of fact, these averments are false because the books will show the amount of Dr. Mott's professional gains both before and after the injury. The exact time when his gains began to lessen becomes very material.

II. "Such evidence exists in the documents in the possession of the plaintiff."

The petition contains clear and specific allegations of the books in the possession of the plaintiff, their character and their contents; and the plaintiff, by not denying them, admits all these allegations to be true.

III. "The production of the plaintiff's books is indispensably necessary to enable the defendants to substantiate their defense."

It will be observed that it is altogether impossible for the defendants to ascertain from witnesses, or from any outside evidence, the amount of Dr. Mott's professional income; that is a matter which is, of necessity, known only to him personally.

If, upon the trial of the cause, it is left to the plaintiff's testimony only, the defendants will be helpless because the facts as to Dr. Mott's income are known only to him and are exhibited nowhere except in his books of account.

The defendants, therefore, must have recourse to those books of account to enable them to substantiate their defense as to the professional gains of the plaintiff. It is vital.

IV. "The defendants have not under their control or in their possession the means of acquiring the information which they seek to obtain."

The books of Dr. Mott are not under the defendant's con-

trol, nor have they any access to them, and they have no means of acquiring any information as to Dr. Mott's income aside from those books, except from hearsay, and such testimony would be of course inadmissible.

V. In the language of a leading case in this court (*Union Paper Collar Company* agt. *Metropolitan Collar Company*, 3 *Daly*, 171) "facts and circumstances are shown which warrant a presumption that the books or documents sought contain evidence which will prove, or tend to prove, some fact which the party applying has to establish."

Clearly the books of Dr. Mott are not only a guide to the amount of his professional income, but are also the only exact and definite source of information.

VI. The foregoing points are all that are necessary to be established for the purpose of entitling a party to an action to a discovery of the books and papers of his opponent as is decided in many well considered cases (*Union Paper Collar Company* agt. *Metropolitan Collar Co.*, 3 *Daly*, 171; *Lefferts* agt. *Brampton*, 24 *How. Prac. Rep.*, 257; *Case* agt. *Banta*, 9 *Bosworth*, 595; *Gould* agt. *McCarty*, 11 *N. Y.*, 575; *Rice* agt. *Ehle*, 55 *N. Y.*, 518; *Townsend* agt. *Lawrence*, 9 *Wendell*, 458; *Livermore* agt. *St. John*, 4 *Rob.*, 12; *Davis* agt. *Dunham*, 13 *How.*, 425; *Exchange Bank* agt. *Monteath*, 4 *How.*, 280). For the provisions of the Revised Statutes upon this subject, see 2 New York Statutes at Large (*Edmonds'*, *pages* 208, 287, *secs.* 21, 22, 23, 24, 25, 26 *and* 27); see Code (*sec.* 388); see Supreme Court Rules, Nos. 17, 18, 19 and 20.

VII. Section 388 of the Code does not repeal the provisions of the Revised Statutes but is auxiliary thereto; and it is also held that a discovery may be had in other cases than those provided for in these rules (*Gould* agt. *McCarty*, 11 *N. Y.*, 575; *Davis* agt. *Dunham*, 13 *How.*, 425).

VIII. The defendants have been diligent. The trial of the action was commenced in June last, and the plaintiff then was allowed by the court to amend his complaint.

This amended complaint was not served until the twenty-ninth of August.

The answer to the complaint was served on the third of October, ultimo.

The defendants have therefore moved with the utmost speed and are not chargeable with laches.

IX. In any view of the case it is plain that the defendants are entitled to a discovery of the check book and cash book.

It cannot be pretended that these books contain any privileged communications.

X. Plaintiff, by way of objection to the application of the defendant, says:

1. That no one but himself understands his books.

The answer to this is that the defendants are not to take his judgment on that point. They have a right to an inspection of the books and to get such information from them as may be possible.

2. That the books contain only partial entries, which entries require a personal explanation.

This is a direct admission of the allegation in the answer to the amended complaint that the books will show, and will tend to show, that the plaintiff's income was not as large as is by him alleged.

As to the necessity for an explanation, that he can make to the jury at the trial.

3. That the entries made in his other books mentioned in the petition are privileged under the statute.

a. This is a privilege of which the physician cannot avail himself. It is only a personal privilege to the party (*Allen* agt. *Public Admr.*, 1 *Bradford, p.* 221).

b. The allegations of plaintiff's affidavit are too general to be of any benefit to him.

c. The statute protects information acquired in attending any patient professionally, "which information was necessary to enable him to prescribe." What we ask is to have leave to inspect the bare record of the number of patients visited

by the doctor, and the number who called upon the doctor and the number and amount of fees received by him. We do not ask for any thing which the doctor found out on such visits.

The name of the patient may possibly incidentally become known to the defendants, but the name of the patient is not "information necessary to enable the doctor to prescribe."

The doctor's books will show the date and the amount, and these are not facts nor is this information "acquired by the doctor in a professional character."

The statute only intends to protect disclosures made by patients to a physician, and we ask for no information disclosed in any way (*Kendal* agt. *Gray*, 2 *Hilt.*, 300–302; *Hewitt* agt. *Prime*, 21 *Wendell*, 79).

c. The petitioners do not desire to obtain any information in regard to any disclosure of the patient, nor as to the diseases for which people were treated. Such private matters could be withheld from them while inspecting other parts of the books which do not contain such privileged matter (*See Elder* agt. *Exrs. of Bogardus*, 1 *Edmonds' Select Cases*, 110).

4. That defendants ask too much, and therefore can have nothing.

The answer is that if we ask only for books showing the amount of professional gains and the number of professional engagements, that the same are numerous should not be attributed to us as a misfortune.

All the books mentioned are material and all contain material facts, and therefore should be discovered.

5. That it has been held that a discovery should not be allowed to enable a party to rebut an anticipated case of the opposite party.

The learned judge who made the order appealed from cites in his opinion 2 *Wait's Practice*, 531, and cases there cited. It will be found, on examination, that these cases do not sustain the dictum in *Wait*.

One of them is flatly in our favor and holds distinctly that a discovery should be allowed of matter to be used in rebuttal.

The facts of that case are almost precisely similar to the case at bar (*Scott* agt. *Walker*, 2 *Ellis & Blackburn*, 555; 75 *Eng. Com. Law*, 555).

XI. The order of the special term should be reversed and the discovery prayed for should be granted.

Hatch & Van Allen, attorneys for plaintiff, respondent, argued the following points:

I. The books containing the entries sought to be inspected are privileged and the defendant has no right to an inspection of them.

"No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon" (3 *R. S.*, 671, *sec.* 119 [*6th ed.*]; *see, also*, *Johnson* agt. *Johnson*, 4 *Paige*, 460, 468).

The doctor brings himself right within the very provision of the statute.

II. Defendant shows no interest in the books. The papers sought, as a general rule, must have been relevant to the case of the party calling for them to support his own title, and he must have had an interest in them and they must not have been privileged (*Newkirk* agt. *Willett*, 2 *J. Cas.*, 413; *Dias* agt. *Merle*, 2 *Paige*, 494; *Van Kleeck* agt. *R. D. Church*, 6 *id.*, 600).

III. The application is too general. Neither in law nor in equity has a party a right to make a general search and examination for evidence among the private books and papers of his adversary (*Brevoort* agt. *Warner*, 8 *How.*, 323).

"He cannot be subjected to a fishing examination or investigation with a view to ascertain the fact whether he has or has not books, papers or documents which may contain evidence relating to the merits of the action or of the defense,

unless he is examined as a witness so that his deposition may be made evidence as well for as against him" (*Hoyt* agt. *American Exchange Bank*, 8 *How.*, 89, 92).

IV. It was discretionary with the court below to grant or deny the motion, and he having passed upon it should be upheld (*Boone* agt. *Cribb*, 20 *Wend.*, 682).

It is not enough that the party believes, or is advised, that the paper contains material evidence. Facts must be shown to support such belief (*Morrison* agt. *Sturgess*, 26 *How.*, 177).

Where, on an application for an order for the discovery of books and papers, the entries sought for are not shown to be evidence but only to contain information by which evidence may be obtained, the order cannot be granted (*Wood* agt. *Figaniere*, 25 *How.*, 522).

It has been the rule, both in equity, formerly (*McIntyre* agt. *Mancius*, 3 *J. C. R.*, 45; 16 *J. R.*, 592; *Lane* agt. *Stebbins*, 9 *Paige's R.*, 622), and since the adoption of the Revised Statutes and the Code (*McAllister* agt. *Pond*, 15 *How.*, 299; *Wilkie* agt. *Moore*, 17 *How.*, 480; *People* agt. *Rector of Trinity Church*, 6 *Abb.*, 177; *Cassard* agt. *Hinmann*, 6 *Duer*, 519), that the allegation by the party that he believes the writings contain evidence, is immaterial unless their character is so defined as to enable the court to determine that they do.

It is a general rule that neither party to an action is entitled to search the other party's papers to enable him to rebut the anticipated case of the other party (*Meakings* agt, *Cromwell*, 1 *Sandf.*, 698; *see, also, opinion of his honor*, JOSEPH F. DALY, *in this case, ante, p.* 148).

This is not a case to which the rule governing inspections applies, we come right within the statute exempting us therefrom.

The order appealed from should be affirmed, with costs.

THE COURT affirmed the order made by J. F. DALY denying the motion for an inspection of plaintiff's books. Affirmed on the argument. No opinion (*See S. C., ante, p.* 148).

SUPREME COURT

In the Matter of Joseph Donohue, Alfred T. Ellis and Henry Ellis.

Constitutional law — habeas corpus — acrobats — cruelty to children — prevention of.

An order by a competent tribunal committing a child found in an employment contrary to the act of 1876, to prevent and punish wrongs to children (*Laws of* 1876, *chap.* 122, *p.* 95), is a final judgment in the matter, within the meaning of the *habeas corpus* act

The constitutionality of the statute under which the commitment was made cannot be impeached upon *habeas corpus* proceedings, as this would be inquiring into the *legality* of the judgment.

By section 3 of the act of 1876, which authorizes any court or magistrate to commit to an asylum, &c., any child engaged or used in violation of the act, the recorder of the city of Poughkeepsie had full power to commit these children to the care of the New York Society for the Prevention of Cruelty to Children.

The act of 1876 (*Laws of* 1876, *p.* 95, *chap.* 122), entitled "An act to prevent and punish wrongs to children," *held*, to be constitutional.

N. Y. Chambers, September Term, 1876.

Proceedings on *habeas corpus* by Alfred Smith to obtain the custody and care of the above named parties, who are infants under the age of sixteen years, and who, also, were committed on the 9th day of September, 1876, by the recorder of the city of Poughkeepsie, under chapter 124 of the Laws of 1876, to the care of the New York Society for the Prevention of Cruelty to Children.

Messrs. Van Wyck and Glassey, for the petitioner.

Mr. L. L. Delafield, for the society.

WESTBROOK, *J.*—The children whose custody this proceeding involves are confessedly of tender years, and were, when the order committing them to the care of the society was made, employed by the relator Smith as acrobats, and if they are again committed to his care they will doubtless be used for the same purpose, as he claims they are regularly indentured to him for that object.

Chapter 122 of the Laws of 1876, entitled "An act to prevent and punish wrongs to children," makes the use, employment or exhibition of children under sixteen years of age, by any person, for any such purpose as Smith has used and held them, a misdemeanor. By section 3 of the act the recorder of the city of Poughkeepsie was fully authorized to make the order committing them to the care of the society aforesaid, and the principal questions which this proceeding presents concern the act and, by implication only, the action of the recorder, which action such act fully justifies.

The order of the recorder committing these children to the care of the society now detaining them was his final judgment upon that matter. It was one which, under the act aforesaid, he was fully authorized to make, and which, as it seems to me, is not reviewable by *habeas corpus*. The writ is not allowable (*vol.* 3, *R. S.* [*6th ed.*], *p.* 873, § 36) to a person "committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction;" and if the writ issues, and it appears the party is so detained (*same volume*, *p.* 878, § 55), it is the duty of "the court or officer" before whom such proceeding is pending "forthwith to remand such party;" and lastly (*p.* 879, § 57), "no court or officer on the return of any *habeas corpus* * * * shall have power to inquire into the legality or justice of any * * * judgment * * * specified in the preceding twenty-second section." I am aware that a plausible argument can be made upon the words "competent tribunal," used in the statute. It is said that the order of the recorder was not one made by a "competent tribunal," because the

statute conferrng the power is unconstitutional, and hence it was not "competent" for him to make the one under which the children are now held. If the act be unconstitutional, it was undoubtedly not "competent" for the officer to act under it at all, and if in that sense the word is used in the *habeas corpus* act, the action of the recorder would be reviewable upon this proceeding. The same statute, however, has also declared that the court or officer before which the writ is returnable is "without" power to inquire into the legality or justice of any * * * judgment" rendered by "any competent tribunal of civil or criminal jurisdiction," and by necessity, therefore, it is forbidden, as that must involve the "legality" of the "judgment" to inquire into the constitutionality of the act under which the officer in making the order acts. In one sense the recorder was a "competent tribunal." To him the same power, the legislature, which passed the *habeas corpus* act, had confided the duty and right of doing what he undertook to do, and it is hardly supposable that there was any intention in the use of the words we are considering to clothe an officer or court which must summarily act with the grave prerogative of nullifying legislative action. It is safer and better, when a judgment has been rendered, which an express statute authorizes, to leave its review to the regular and more deliberate process of the higher courts, than to make of every court and officer authorized to issue this writ, a tribunal summarily to decide such grave and momentous questions (*People* agt. *Fancher*, 9 *Sup. Court R., N. Y.* [2 *Hun*], 226). If, however, the decision upon this application must depend upon the constitutionality of the act of 1876, no great difficulty is seen. The right of the state to care for its children has always, and with very great propriety, been exercised. Under its laws, whenever the welfare of the child has demanded, its courts have frequently interfered for the protection of children of tender years. It has again and again taken from one parent and given them to the other, and has

sometimes refused so to do, the good and welfare of the child being the object always in view. It has so acted without the intervention of a jury, and that power has never been supposed to have been improperly exercised, because a jury was not allowed, and due process of law not had. If the courts of the state may, by virtue of their general powers, interfere for the protection and care of children, it is not seen why the legislature may not prescribe the cases in which children shall be recovered from their custodians, and a mode provided for their summary disposition. For example, if children should be placed to learn the business of stealing, could not the legislature provide a summary remedy for the evil? Has the law no power to rescue summarily female children held for purposes of prostitution, or interfere in an expeditious manner in very many cases, when children of tender years are exposed to peril or temptation? This will hardly be argued, or if claimed, authority most abundant can be found to justify it. Precisely this ground the act of 1876 covers. In my judgment it is a most wise, salutary and beneficent statute, born of Christian civilization, and founded upon the teachings of Him, to whom children were objects of tender love and care. It needs no evidence to demonstrate to our judgment that the life to which these children were subjected and from which they were rescued was perilous to all their best interests. It was a dangerous one to them, physically and morally. The contortions, evolutions and performance of the acrobat are, clearly, physically dangerous, and the surroundings, accompaniments and companions of the circus ring are equally so morally. The recorder of the city of Poughkeepsie was clearly right, and his action must be upheld.

The writs of *habeas corpus* are discharged and the children remanded to the care of the society, which has thus far properly discharged its duties.

N. Y. SUPERIOR COURT.

DANIEL BUTTERFIELD and others agt. SIMON KLABER and another.

Nuisance — noise produced by machinery — steam whistle — injunction.

The business of cutting and polishing marble by machinery or otherwise is not *per se* a nuisance, and an injunction will not lie at the suit of an adjoining house-owner to restrain a party from the continuance of such business.

Noises are not *ex necessitate* nuisances, even when disagreeable; and it is only when they are of a character so objectionable as fairly to come within the meaning of that significant term that a court of equity will interfere to repress or restrain them.

Noise, to constitute a nuisance, must be *unusual, ill-timed or deafening.*

It seems that the use of a *steam whistle*, which is unnecessary to the successful prosecution of a business, may be designated as a *nuisance*, and its use may be restrained by injunction.

The proper rule, in cases like the present, would *seem* to be: That, in the enjoyment of his own land, one must be confined to such reasonable use thereof as will not inflict injury on his neighbor or interfere with his neighbor's reasonable enjoyment, and must submit to such inconveniences as necessarily result from the reasonable use and enjoyment by his neighbor of land belonging to him.

Davies & Whitehead, for plaintiff.

Townsend & Mahan, attorneys, *and James Emott*, for defendants.

SANDFORD, *J.*— This action was brought by the owners of the "apartment house" known as "the Albany," situated on Broadway, between Fifty-first and Fifty-second streets, in the city of New York, to enjoin the use in a factory situated upon adjacent premises, on the northerly side of Fifty-first

street, of a steam engine and machinery adapted to and employed in the business of cutting and polishing marble.

The complaint alleged that by the working and operation of the said steam engine and machinery, a continuous, loud, dissonant, jarring and offensive *noise* was produced, whereby most of the apartments in the plaintiffs' building were rendered unfit for habitation.

That in consequence of such use and operation and of the noise resulting therefrom, a portion of plaintiffs' apartments were vacant and could not be let, and that the tenants of other apartments therein were threatening to throw up their leases and abandon the premises. That by reason of such noise and nuisance, the plaintiffs had suffered damage in the sum of $10,000. Judgment for an injunction, with damages and costs was accordingly demanded.

The answer controverted the allegations of the complaint, as to the extent and effect of the noise produced by defendants' engine and machinery, and as to any damage claimed to have resulted therefrom, but admitted the existence and operation of such machinery on defendants' premises daily, during the ordinary business hours of business days.

On the trial, evidence was offered tending to show that the occupants of plaintiffs' building were annoyed to some extent, by dust as well as by noise, proceeding from the defendants' premises, and also by a vibration or jarring, occasioned by the movement of such machinery, and communicated thereby to the walls of plaintiffs' building. Such evidence was received, notwithstanding the objection that the complaint contains no express averment of injury or annoyance by reason of dust or vibration, and an amendment of the pleadings was ordered so as to conform them to the proofs in this respect.

I have, therefore, to determine upon all the evidence, first, what the facts are with respect to the alleged jarring and vibration, dust and noise in so far as the same are produced by the defendants' engine and machinery; and secondly, whether upon the facts as they may be found the plaintiffs are entitled

to the indemnity and immunity which they demand in their complaint.

It appears from the evidence that the defendants' business was established upon the premises now occupied by them as early as 1869, and has since been prosecuted there in substantially the same manner as at present, though additional machinery has been introduced, from time to time, according to the exigency therefor.

Then, and until recently, the surrounding territory was to a great extent unsettled and unimproved.

The land was rough and rocky, much of it was wild and vacant. Since then improvements have been made from time to time in the neighborhood, adapted as well to the purposes of business as of residences. Dwellings have been erected and factories and storehouses have been built. It is impossible to say from the evidence, that the locality is one appropriated exclusively either to the purposes of trade or of. residence, or one from which mechanical pursuits have been or are generally excluded.

On the contrary, it is in evidence that Broadway in this particular region, as in most others, is a business thoroughfare, and that the adjacent portions of the streets crossing it, are as well as itself fronted by buildings used indiscriminately for habitation and for the various avocations of commerce, manufacture and the mechanic arts. Indeed, the plaintiffs' building which was commenced in 1874 and finished in 1875, would appear to have been itself erected with express reference to the promiscuous character of the neighborhood in this respect, since the whole of its Broadway front on the lower floor is divided into stores, and is appropriated to the purposes of business and trade. Other similar structures of like character have been since built. So also have large storehouses and factories, in some of which machinery is used. It cannot, therefore, be maintained that a lawful business, not in itself noxious or deleterious to health, not offensive to the senses, not seriously detrimental to the comfortable existence

of those who dwell in the neighborhood, in short, not *per se* a nuisance, is unsuited to *this*, if indeed, such a business reasonably conducted, can in judgment of law be deemed unsuited for *any* locality, however fastidious and exclusive the habits, tastes and pursuits of its occupants.

I have no hesitation in asserting upon general grounds as well as upon the evidence in this case, that the business of cutting and polishing marble by machinery or otherwise, is not *per se* a nuisance; and it follows as a necessary consequence, that the defendants may rightfully and lawfully prosecute it in the factory and upon the premises adjoining the plaintiffs' building without interference from them, unless the mode of conducting it has been or threatens to be such as materially to injure the plaintiffs' property, or to interfere with the comfortable existence of such of their tenants as are reasonable people, able and willing to enjoy life, "*subject to the inconvenience necessarily resulting from the reasonable use by a neighbor of his own land.*" (*Campbell* agt. *Seaman*, 2 *N. Y. S.* [*T. & C.*], 235.)

People, however, who have extraordinary sensibilities, or nervous temperaments, the sick, the afflicted, they whose refined tastes, habits and inclinations lead them to prefer complete silence and exclusion, and an abode remote from the busy haunts of human industry, are not to be selected as best qualified to attest or determine the precise limits of mutual forbearance or the absolute essentials of comfortable enjoyment. The evidence shows, that when the Albany building was about to be commenced it was ascertained that the defendants' easterly wall encroached several inches upon the plaintiffs' land, and in fact, occupied to the extent of such encroachment a part of the premises intended to be covered by their proposed new structure. Notwithstanding this encroachment, and although an alteration in their plans was thereby necessitated, the plaintiffs proceeded to build, placing their own westerly wall in close contiguity to the easterly wall of defendants' factory.

It would appear from the evidence that the defendants' wall afterwards settled in such a manner as to impose a part of its weight upon that of the plaintiffs. At all events, the two walls were in close contact, and while they so remained vibration or jarring was occasioned by the motion of defendants' machinery, which was communicated to that portion of the Albany against which defendants' wall impinged. Such vibration or jarring was perceptible to the occupants of the adjoining apartments in the Albany, and was disagreeable and unpleasant, particularly on the lower floors.

There is no evidence that it impaired in any degree the solidity or stability of the plaintiffs' wall, or resulted in actual physical injury to their building, or in any way impaired its value; but it interfered with the comfort and enjoyment of some of the tenants, who from ill health or other causes, were perhaps more than ordinarily susceptible. The annoyance thus occasioned continued until the spring of 1876, when the defendants took down their wall, pending a suit of similar character to this brought against them in the supreme court by the plaintiffs, but which was subsequently discontinued by consent, and removed the same to their own premises, reconstructing it upon their own land, and in such manner as to leave an intermediate vacant space from five to six inches wide between the two buildings. Such removal and reconstruction were effected during the months of June and July, 1876, and before the commencement of this suit. There is conflict in the evidence as to whether such jarring or vibration continued at all after the defendants' wall was removed, but witnesses for the plaintiff, who speak of "some jarring" after the alteration had been effected pronounced it "very slight." One who occupied the third floor apartment on Fifty-first street, immediately adjacent to the defendants' premises, failed to observe any vibration or shaking of the walls whatever. Another speaks of a vibration similar to the tremulous motion caused by passing vehicles, but not so heavy. No vibration of any consequence appears to have been ever observed elsewhere

than in the apartments on Fifty-first street, immediately contiguous to the defendants' premises, and since the alteration by which the walls of the two buildings were made separate and independent, vibration has substantially ceased even there.

At least the preponderance of evidence against perceptible jarring or vibration is such as to render inevitable a finding of fact adverse to the claims and allegations in this regard made by or in behalf of the plaintiffs.

The simple tests applied by one of the witnesses for the defense, who, very improperly perhaps — inasmuch as he acted without the knowledge and in the absence of the plaintiffs — placed a full glass of water upon the window-sill of the plaintiffs' building, and again upon a wooden bar, leveled horizontally upon two files driven into the wall — while the defendant's machinery was in full operation — would seem to furnish a conclusive demonstration of the immobility of the walls of the Albany and of the fitness of its apartments for human habitation, so far as any vibratory motion therein is concerned.

Irrespective of such tests, the evidence would not, in my judgment, warrant or sustain a finding adverse to the defendants in this particular.

With respect to dust, it may be remarked that one of the plaintiffs, general Butterfield, who occupies an office on the ground floor of the Albany, at the corner of Fifty-first street and Broadway, and who was examined at length in regard to the nature of the defendants' business and their mode of conducting it — who described with great particularity the machinery employed therein, the operation and movement of each particular machine, the noise produced by each, and the general effect of all as observed by himself, both in the Albany and in the defendants' factory — made no mention whatever in his testimony, of any grievance resulting from this source, or of any complaint made by any one in regard to it. Other witnesses on behalf of the plaintiffs, tenants of apartments opening on

the court in the rear of their building, appear to have observed the fact that their furniture often became dusty, particularly in summer when the windows were open. One lady testified that the dust made her cough. A tenant of one of the stores on Broadway stated that the only serious inconvenience experienced by himself and his wife, who resided with him in the rear part of his store, arose from marble dust, which on one occasion, when the weather was warm and the windows both of the factory and of his own store were open, penetrated his premises in considerable quantities, to the manifest detriment of his stock of goods; he objected strenuously to the windows of a manufactory looking into his dwelling, as "against the law of all decent nations," but expressed the opinion that he could live on the premises very comfortably and to his entire satisfaction if the windows in defendants' wall were bricked up so as to preclude observation and prevent the emission of dust. Other witnesses for the plaintiffs, occupants of their building and of apartments therein, having windows exposed towards defendants' premises, failed to notice any dust, and experienced no inconvenience of that kind.

On behalf of the defendants it appeared, without contradiction, that every machine in their factory, with the single exception of the lathe, was used in connection with water, and in such a manner as to preclude the possibility of any dust arising therefrom. The lathe was run dry, but the workmen employed thereon testified that little or no dust was produced by its use. The tool employed chipped off small particles of marble with sharp edges, from which he found it necessary to protect his eyes by glasses, but although standing directly in front of and over the machine, he experienced no difficulty in breathing. Other witnesses described the atmosphere of the work-room as wholly free from dust; and residents of adjacent premises found no cause of complaint by reason of any dust from the factory reaching their yards or penetrating their apartments.

I think it clear, from the evidence, that any dust which may have penetrated the apartments in plaintiffs' building, could not have been produced by the operation of defendants' machinery. Possibly, it may have proceeded from manual labor upon marble on defendants' premises, but the proofs scarcely warrant this surmise. From whatever source it came the annoyance produced by it was not, in my judgment, sufficient to warrant the intervention of a court of equity, in staying the use and operation of defendants' machinery. I must find as a fact in the case that the operation of such machinery does not produce a dust, whereby any portion of the plaintiffs' premises are rendered unfit for habitation. That the operation of the several machines in defendants' factory is attended with *noise* cannot be denied. Noise is usually incident to the motion of machinery and to mechanical pursuits — especially those which are carried on through the agency of steam. But noises are not *ex necessitate* nuisances, even when disagreeable; and it is only when they are of a character so objectionable as fairly to come within the meaning of that significant term that a court of equity will interfere to repress or restrain them.

In the case of *McKeon* agt. *Lee* (4 *Robt.*, 449), which is invoked by the plaintiffs' counsel as an authority in their favor, it was said that: "Mere noise, perhaps, unless *unusual*, *ill-timed*, or *deafening*, may not be such a nuisance as to authorize an indictment or an action therefor, even when it interferes with another person's avocations or pursuits;" and the decision in that case proceeded upon the assumption that "something more palpable than discomfort by noise was established by the evidence." A reference to the report of the case, on appeal to the court of appeals (51 *N. Y.*, 300) discloses the fact that the judge before whom the trial was had based his judgment exclusively upon the ground that "the action of the defendants' machinery produced a jarring and shaking of the said houses of the plaintiff, injuring the same and amounting to a private nuisance."

There was no finding whatever in that case that any noise was produced, or that annoyance or inconvenience was occasioned or experienced, otherwise than by the jarring or shaking of the plaintiffs' building. So that the remarks made by the learned judge who rendered the opinion of the court at general term, with respect to noises considered as nuisances, were in no wise applicable to the question actually presented for adjudication, and were merely *obiter dicta*. But if we accept the suggestions of that learned judge as correctly defining the term nuisance when applied to noise, it is essential that noise to constitute nuisance must be "*unusual, ill-timed or deafening.*"

Leaving out of view, for the present, the noise produced by defendants' steam whistle, to which I will advert hereafter, I am forced, by a great preponderance of evidence, to find that the noise produced by defendants' machinery was not *unusual*. It was such as is ordinarily incidental to the operation of similar machinery used in the conduct of the like business in other parts of the city.

As described by the plaintiffs' own witnesses, "it sounded like a factory." It was a "buzzing or whirring" sound, "the noise of a steam engine — the same as most engines." I must also find that it was not *ill-timed*. The works were in motion only during the ordinary business hours of business days. There is no pretense that they ever infringed upon the hours usually allotted to repose. From seven in the morning until five or six o'clock in the evening, with the usual hour of intermission at noon, the defendants' business went on, and its hum was audible, but it was never *deafening*. Its effect upon the invalid Taintor was, doubtless, aggravating, and it proved unpleasant to a sensitive lady, one of the plaintiffs' tenants. "Set her crazy," to use her own language; but she nevertheless retained possession of her apartment for a considerable time after the expiration of her lease, the term of which was a year and a-half There was certainly no indication of mental aberration whatever in her

appearance and manner, or otherwise than in her extravagance of expression while she occupied the witness stand.

Carefully weighing the evidence on both sides, I am unable to view this case as one for which *Lee* agt. *McKeon* may be regarded as a precedent, even if we assume that the element of noise was at all involved in the decision there rendered. I am, indeed, inclined to the belief that the noises now under consideration are not only not deafening, but not *loud*. They are not audible in the apartments of the Albany, immediately adjoining those contiguous to defendants' premises.

They are not audible in other apartments of that building, although such apartments have windows opening on the court yard in the rear. They are not audible in the office of the defendants, which is within the building where the machinery is situated, and separated from it only by a partition. They are scarcely audible upon the sidewalk of Fifty-first street, immediately in front of the defendants' premises, unless the doors or windows are open. They are scarcely audible in the private residences near by, and abutting upon or in close proximity to defendants' property in its rear. No inconvenience is experienced from them by the occupants of such residences. They do not preclude conversation in an ordinary tone of voice in the room where the machinery is situated. They cannot, I think, be said to interfere materially with the comfortable existence of ordinary people, in good health, who live sufficiently near the premises to hear them; they certainly do not render any apartments in the plaintiffs' building unfit for habitation. The fact that two of such apartments are now vacant does not justify the inference that such apartments are not habitable. There is other evidence in the case suggestive of a cause to which their vacant condition can reasonably be ascribed — evidence that they are held to day at the same rental as when the Albany was first completed, notwithstanding a depreciation in the value of that property of about thirty per cent, and notwithstanding a still greater general depreciation in the value of

real property in other parts of the city. This general depreciation of values throughout the city, to which one of the plaintiffs adverts, and the absence of any general demand for real estate, justify the surmise that vacant buildings and apartments may owe the absence of occupants to other than merely local causes.

The noise produced by the defendants' steam whistle differs essentially from the sounds emanating from their workshop. There is no conflict of evidence in regard to it, and it is conceded to be unnecessary to the successful prosecution of defendants' business. It has been discontinued for some time, in obedience to an injunction order of the court, granted *pendente lite;* and the defendants' counsel, in effect, concede that it may, without impropriety, be designated as a nuisance. Upon the evidence, I decide that it is a nuisance, and that, as such, it should be perpetually enjoined and restrained, notwithstanding the omission from the complaint of any specific averment with respect to it. I think the evidence as to its nature and character, even if objected to, would have been admissible under the allegation of the complaint which relates to loud, dissonant and offensive noises produced by defendants' machinery; and that judgment may, therefore, be properly rendered in favor of the plaintiffs, and against the defendants, for its perpetual suppression.

But impressed as I am with the conviction that the operation of the defendants' machinery causes no perceptible jarring or vibration of the plaintiffs' building, and no appreciable injury thereto, that the noise proceeding from such machinery, other than the blast of their steam whistle, is not such as to render the plaintiffs' apartments, or any of them, unfit for habitation, or to materially impair the comfortable existence of ordinary people occupying such apartments, I must hold that the defendants cannot be restrained from using their steam engine and machinery in the manner and for the uses in which they have heretofore been employed.

In arriving at this conclusion, I adopt and follow what seems to me to be, on the whole, the most satisfactory rule in regard to such cases, viz.: That in the enjoyment of his own land one must be confined to such reasonable use thereof as will not inflict injury upon his neighbor, or interfere with his neighbor's reasonable enjoyment; and must submit to such inconveniencies as necessarily result from the reasonable use and enjoyment by his neighbor of land belonging to him (*Campbell* agt. *Seaman*, *ubi supra*).

Let findings be prepared in accordance with these views and submitted to me for signature.

No costs will be allowed to either party.

N. Y. COMMON PLEAS.

ADOLPH NEUENDORFF, plaintiff and appellant, agt. ABRAHAM DURYEA *et al.*, defendants, respondents.

Theatrical and other entertainments or performances — observance of the Sabbath — constitutional law.

The act entitled "an act to preserve the public peace and order on the first day of the week, commonly called Sunday" (*Laws of* 1860, *chap.* 501), does not violate section 16 of article 3 of the Constitution, which declares that "no private or local bill which may be passed by the legislature shall embrace more than one subject and that shall be expressed in the title."

The constitutional power of the legislature to enact laws for regulating the observance of the Sabbath cannot be questioned.

It is competent for the legislature to determine and declare what recreations or diversions are harmless and innocent, and therefore lawful, and what amusements operate injuriously upon others, or exert a baneful influence upon the community, and thus tend to a breach of the peace, and should, for that reason, be prohibited. And if the legislature, in their wisdom, come to the conclusion that certain pastimes or amusements are hurtful or injurious to others, and tend to disturb the peace and tranquillity of the public, the courts will not ordinarily, even if they have the power to do so, sit in review of the judgment and discretion exercised by the law making power.

The words "to preserve the public peace and order," in the title of the act of 1860, properly express its object.

It is not necessary that the title of an act should declare the subject thereof in the most apt and expressive language that could be chosen. If the subject of the act is honestly and reasonably indicated by its title, the constitutional requirement will be fully complied with.

A solemn act of the legislature should not be declared unconstitutional and set aside by the courts on slight grounds.

The case of *Durkee* agt. *The City of Janesville* (26 *Wis.*, 697) reviewed and distinguished.

General Term, December, 1875.

Before LOEW, *P. J.*, LARREMORE *and* J. F. DALY, *JJ.*

Neuendorff agt. Duryea.

APPEAL by the plaintiff from a judgment of the special term in favor of the defendants, and also from an order made at the same time denying a motion to continue a preliminary injunction.

Henry Wehle & Charles Wehle, for plaintiff and appellant.

E. Delafield Smith, corporation counsel, *& A. Oakey Hall*, for defendants and respondents.

LOEW, *J.* — The plaintiff, who is a theatrical manager, has been in the habit of giving dramatic and other entertainments or performances on Sundays, at a place, in this city, known as Terrace garden. The board of commissioners of the department of police, in the city of New York, made an order forbidding the giving of any such performances on that day, and threatened to arrest the plaintiff, and the artists in his employ, in the event of any violation of the said order. The plaintiff thereupon instituted this action against the defendants, who are the commissioners of police aforesaid, the superintendent of the police force, and one of the captains of police in said city, for the purpose of restraining them from enforcing the said order and from interfering with him in giving such entertainments on Sundays. The defendants, in their answer, averred that the commissioners of police issued the mandate in question, in pursuance of chapter 501 of the Laws of 1860, which interdicts such exhibitions on that day. To this answer, the plaintiff interposed a demurrer. The demurrer, and a motion to continue a preliminary injunction which had been granted, were argued together. The court, at special term, sustained the defendants' answer, and rendered judgment in their favor upon said demurrer, and, at the same time, vacated the injunction. The plaintiff, thereupon, brought this appeal.

The act referred to prohibits the giving of theatrical and other exhibitions or entertainments on Sunday, within the

city and county of New York. The constitutional power of the legislature to enact laws for regulating the observance of the Sabbath is not seriously questioned. Nor, indeed, could it very well be; for on two different occasions have our courts upheld the very act now under consideration as a valid and constitutional exercise of legislative power and authority (*The People* agt. *Hoym*, 20 *How.*, 76; *Lindenmuller* agt. *The People*, 33 *Barb.*, 548). In the last named case judge ALLEN, in rendering the decision of the general term of the supreme court, delivered an able and exhaustive opinion which, in our judgment, is conclusive on this point.

The objection raised, and mainly relied on by the plaintiff's counsel in this case is, that the act of 1860 is in violation of section 16 of article 3 of the Constitution, which declares that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." As this point was not raised in either of the two cases alluded to, those adjudications do not touch it, and we are now, for the first time, called upon to pass an opinion upon it.

The act in question is undoubtedly a local one, and thus comes within the legislation intended to be regulated by the constitutional provision just cited. It is conceded that it embraces but one subject, namely, the prohibition of dramatic and other performances in the city of New York on Sundays. It is claimed, however, that this subject is not expressed in the title. The question therefore, arises, does the title of the act conform to the requirement of the Constitution in this respect? We think it does. The title is, "An act to preserve the public peace and order on the first day of the week, commonly called Sunday. The term "*preserve*" means "to keep," "to secure," to "uphold," and "*public peace*," "is public tranquillity," "that quiet, order and freedom from agitation or disturbance which is guaranteed by the laws."

It is competent to the legislature to determine what pastimes or amusements have a tendency to interrupt public tranquillity and cause agitation or disturbance. They may consequently, with a view to securing or upholding tranquillity, quiet and freedom from disturbance, prohibit such amusements or pastimes, and thus preserve the public peace. That which one may consider merely innocent amusement or recreation, another would perhaps deem highly reprehensible, immoral and pernicious. Who is to decide between the two, if not the law makers? It is their province to declare what recreations or diversions are harmless and innocent, and therefore lawful, and what amusements operate injuriously upon others or exert a baneful influence upon the community, and thus tend to a breach of the peace, and should, for that reason, be prohibited. And if the legislature, in their wisdom, come to the conclusion that certain pastimes or amusements are hurtful or injurious to others, and tend to disturb the peace and tranquillity of the public, the courts will not ordinarily, even if they have the power to do so, which may be questionable, sit in review of the judgment and discretion exercised by the law making power. In the present instance the legislature, judging from the title of the act, evidently regarded the giving of theatrical and other performances, in the city of New York, on Sunday, as vicious, subversive of the public welfare, and tending to disturb the public peace, and we are unable to say, judicially, that such cannot possibly be the case. As Mr. justice ALLEN very pertinently observes in *Lindenmuller* agt. *The People* (*supra*): "The gathering of a crowd on a Sunday at a theater, with its drinking saloons and its usual, if not necessary, facilities for and inducements to licentiousness and other kindred vices, the legislature might well say was not consistent with the peace, good order and safety of the city."

Again, the word "*order*" signifies "proper state or condition," "established or settled mode of proceedings." To

"*preserve order*," therefore, means to keep or secure the proper state or condition or established mode of proceeding. Now, by the Revised Statutes all work and labor on Sunday, except works of necessity and charity, are forbidden under the penalty of one dollar for each offense (1 *R. S.*, 676, *sec.* 70). Thus the established mode of proceeding for a good and law abiding citizen is to refrain from all work and labor on Sunday. If he does that, he may be said to be in a proper state or condition so far as this statute is concerned. But actors and others engaged in giving theatrical and other exhibitions violate this provision of the Revised Statutes. Hence it was the design of the legislature, in enacting the act of 1860, to cause the persons engaged in the performances mentioned therein to adhere to the established mode of proceeding, and thus uphold or secure the proper state or condition, or in other words, "*preserve order.*" And they seek to accomplish this purpose by increasing the penalty for the doing of any of the prohibited acts from one dollar to $500, and moreover, declaring that the offending party shall in addition be guilty of a misdemeanor.

It will thus be seen that the words "to preserve the public peace and order, &c.," in the title of the act of 1860, properly express its object. It is not necessary that the title of an act should declare the subject thereof in the most apt and expressive language that could be chosen. If the subject of the act is honestly and reasonably indicated by its title, the constitutional requirement will be fully complied with. Says chief justice CHURCH (*In re Mayer*, 50 *N. Y.*, 506): "The Constitution does not require that the title of an act should be the most exact expression of the subject which could be invented. It is enough if it fairly and reasonably announces the subject of the act."

The same learned jurist, in the case of *The People* agt. *Briggs* (*id.*, 558) remarks: "It is not requisite that the most expressive title should be adopted, nor should courts criticise too rigidly the details of a bill to find extraneous matter."

In the last mentioned case the title of the act, the constitutionality of which was questioned, was "an act to amend the several acts in relation to the city of Rochester." It was claimed by the appellants that it contained several independent subjects not mentioned in the title. The court, however, only considered the two principal points relied on. One was that the act authorized the water commissioners of the city of Rochester to contract with the trustees of adjacent villages through which the water might be conducted to the city, to supply such villages with water, and conferred authority on the said trustees, in case they made any such contract, to levy and collect the annual expense of the same with the regular annual tax of the village. The other was that the city railroad was authorized to lay its tracks under the direction of the municipal authorities, on either side of Lake avenue, instead of the center thereof. But a majority of the court were of the opinion that the act was constitutional, and that the defendants had a valid title to the office of the commissioners of public works, to which they had been appointed in pursuance of the provisions of the said act.

So, also, with respect to the police justices' act (*Laws* 1873, *chap.* 538). It directed the way and manner in which the police justices in the city of New York and their clerks should perform their respective duties, and provided for the orderly and proper administration of justice in the said courts. It also legislated the then existing police justices, police court clerks, stenographers and other officials out of office. The act was entitled "An act to secure better administration in the police courts of the city of New York." This title did not in terms indicate that the ten police justices then in office were to be ousted and an equal number of other persons appointed in their places. The court of last resort, nevertheless, held that the act was constitutional and valid, and that the new appointees were lawfully entitled to the offices held by them. The court say that every provision which had a tendency to secure better administration in those courts, and which the

law makers, in their wisdom, might deem necessary or pertinent to accomplish the object, could legitimately be put in the act (*In re Wenzler* agt. *The People*, *Ct. of Appeals*, *MS. op.*).

But it is said that the title should have disclosed that the act is confined in its operation to the city of New York, and that this omission is fatal to its validity. The case of *Durkee* agt. *The City of Janesville* (26 *Wis.*, 697) is cited in support of this proposition. The title of the act in that case was, "An act to legalize and authorize the assessment of street improvements and assessments." But inasmuch as its sole object was to legalize certain proceedings of the common council of the city of Janesville relative to assessments, the supreme court of Wisconsin held that it was repugnant to a constitutional provision of that state, similar to the one contained in our own Constitution, and was therefore void. Although at first view this case would seem to be decisive of the one under consideration, yet we think that, on reflection, it will be seen that it materially differs from the latter, and does not aid the plaintiff. One of the objects of the provision of the Constitution referred to is, to apprise the members of the legislature and the public of the subject of the provisions of a local bill, by a mere inspection of its title, so as to guard against fraud, misapprehension or mistake in its passage (*The People* agt. *Briggs*, *supra*). Now the title of the act passed by the Wisconsin legislature did not indicate its object. As the court very properly say, "no one reading this title would for a moment suppose that the sole purpose of the law was to legalize the proceedings of the common council of the city of Janesville in making these special assessments." Nor is there any thing in this title from which any one would or could infer that the act was intended to legalize or validate all the assessments which had been laid throughout the entire state, and that, consequently, it was also applicable to those which had been made in Janesville. There was, therefore, absolutely nothing in the title which

indicated, either to the legislators or the residents of Janesville, that the provisions of the act had any reference whatever to that city. In the case at bar, on the other hand, a person on perusing the title would, we think, at once conclude that the act was a general one for the better observance of the Sabbath through the whole state. Indeed, the learned counsel for the plaintiff expressly concede this in their points. Now the whole necessarily includes all its component parts, and the greater, of course, comprehends the lesser. So that, although the title does not, in terms, refer to the city of New York, it nevertheless indicates that the subject-matter of the act relates to that city. Hence, members of the legislature and residents of the city of New York had notice that the provisions of the act would affect the latter, and could have opposed its passage if they had seen fit to do so. The title of the act, therefore, did not, and could not, mislead or deceive any one. Moreover, a solemn act of the legislature should not be declared unconstitutional and set aside by the courts on slight grounds. In the language of chief justice CHURCH (*The People* agt. *Briggs*, *supra*), "every presumption is in favor of the validity of legislative acts, and they are to be upheld, unless there is a substantial departure from the organic law."

It results, from what has been said, that the act in question cannot fairly be said to be inconsistent with, or in contravention of, the clause of the Constitution referred to, and that the judgment and order appealed from should be affirmed, with costs.

LARREMORE, J., concurred.

J. F. DALY, *J.* — The act of the legislature entitled "An act to preserve the public peace and order on the first day of the week, commonly called Sunday" (*Laws of* 1860, *chap.* 501), which prohibits theatrical performances on Sunday in the city of New York, is not within the letter or spirit of the constitutional provision that "no private or local bill which

may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title" (*Const., art.* 3, *sec.* 16). Amusements, salutary or harmless in themselves, of a public character and attracting crowds of persons, may not comport with the order necessary to the due observance of the Sabbath.

It is for the legislature, representing the people, to define and establish regulations for Sunday in matters of public amusement and recreation as well as matters of business. The public selling of merchandise is prohibited by law on that day, as well as the service and execution of civil process, hunting, fishing and other sports and pastimes (1 *R. S.*, 675, 676); and so might public ball playing, regattas, and all other recreations calculated to attract crowds or to interfere in any manner with that peace and quiet which in this state it has always been the aim of the legislature to preserve on that day. Although a theater is as much the private premises of the proprietors as a store is of the merchant, it is certainly a place of resort for the public, and as much within the scope of legislative regulation on Sunday as the business of selling merchandise. There can be no limit to legislative interference with public recreations and business on Sundays if the power of the legislature to make provision for the observance of Sunday is admitted, and the latter is not questioned. All such enactments are proper in a single act "for the preservation of public peace and order" on that day, otherwise the act could be no more than a general repetition, in words, of its title, and the citizen would receive from it no information as to what he might or might not lawfully engage in; and the public officers would either be left to the arbitrary exercise of discretion in carrying out its provisions, or be powerless to effect the end it was intended to accomplish. The numerous decisions in this state on the constitutional provision above cited are directly in point (*In re Mayer*, 50 *N. Y.*, 506; *People ex rel. City of Rochester* agt. *Briggs*, 50 *N. Y.*, 553; *Mutual Ins. Co.* agt. *The Mayor*,

8 *N. Y.*, 253; *Williams* agt. *The People*, 24 *N. Y.*, 406; *Sullivan* agt. *The Mayor*, 53 *N. Y.*, 652; *Matter of Volkenning*, 52 *N. Y.*, 650; [*in memoranda*] *In re Wetzel* agt. *The People in Error, Ct. Appeals, Nov.*, 1874).

The judgment and order appealed from should be affirmed.

N. Y. SUPERIOR COURT.

William S. Keiley, as Receiver, agt. Charles Dusenbury, impleaded.

In order to obtain the warrant under the non-imprisonment act of 1831 (Stillwell act) two things had to be established: First, that defendant had assigned, removed or disposed of his property with intent to defraud his creditors; and second, that the defendant fraudulently contracted the debt or incurred the obligation respecting which suit is brought.

By section 4 of said act it is enacted that no warrant shall issue unless satisfactory evidence be adduced that there is a demand due plaintiff for which the defendant, according to the provisions of said act, cannot be arrested or imprisoned.

By the fourth subdivision of section 179 of the Code, the defendant may be arrested when he has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought.

An examination of the judgment roll in the original action shows that defendant could have been arrested in that original action, and if so, he cannot be arrested under the Stillwell act.

Section 262 of the Code provides, "No person shall, on examination pursuant to this chapter (proceedings supplemental to execution), be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution; nor shall he be excused from answering any question on the ground that he has before the execution executed any conveyance, assignment or transfer of his property for any purpose; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution."

The only criminal fraud that could reach a case like this are those imposed by the Stillwell act.

The act of 1831 contains a similar enactment, and prohibits the use of the examination against him.

The supplementary proceedings fall within the provision of the statutes, and are not evidence against defendant.

Special Term, January 15, 1877. *Argued December* 26, 1876; *decided January* 15, 1877.

Motion to strike out the testimony of the defendant contained in the supplementary proceedings, and to dismiss proceedings.

The plaintiff, as receiver, in supplementary proceedings in an action (*Peter Morris et al.* agt. *Selah Hiler*) commenced an action in this court to set aside an assignment from one Selah Hiler to defendant Dusenbury, as trustee, as fraudulent, and to recover a personal judgment against him for the amount of the original judgment, in *Morris et al.* agt. *Hiler*, upon the ground that the assignment was void under the statute, and that therefore the defendant was liable to the plaintiffs for intermeddling with the trust fund.

On the trial judgment was rendered in favor of the plaintiffs setting aside the assignment and decreeing judgment against the defendant personally and in favor of the plaintiff, as receiver, for the sum of $3.627.91.

Upon this judgment an execution was issued and returned unsatisfied, and afterward the defendant Dusenbury was examined in proceedings supplementary, and on such examination testified to the disposal of certain real property *subsequent* to rendering the decision but before entry of judgment.

Upon these facts the plaintiff instituted proceedings under the non-imprisonment act and had defendant arrested, who thereupon controverted the facts and demanded a trial.

On the trial of the latter proceedings the plaintiff's counsel put in evidence the judgment roll in the action (*Keiley, as Receiver*, agt. *Dusenbury*), and also the supplemental examination of the defendant Dusenbury and then rested; thereupon the defendant's counsel moved to strike out the evidence adduced by the supplementary proceedings and to dismiss the proceedings upon the ground, *first*, that the judgment roll showed that the defendant could have been arrested in that action under subdivision 4 of section 179 of

the Code, and subsequently cannot be arrested under the non-imprisonment act; and *secondly*, that under section 262 of the Code and section 42 of the non-imprisonment act the supplementary examination cannot be used as evidence against defendant.

Charles Blandy (*Hall & Blandy*), for defendant, for the motion.

D. M. Porter, for plaintiff, opposed.

SPIER, *J.* — The proceedings are taken, under the act of 1831, against the defendant for assigning, removing or disposing of his property with intent to defraud creditors, and the plaintiff has obtained a warrant under that act. Prior to obtaining the warrant, he had taken measures against the defendant in proceedings supplementary to execution, under section 292 of the Code. Upon his application for the warrant under the act of 1831, he used the evidence taken in the supplementary proceedings for the purpose of obtaining the warrant. I am inclined to the opinion that this evidence was improperly used for that purpose, and must be rejected; and if stricken out, I think there is not sufficient evidence to sustain the warrant. In order to obtain the warrant under the act, two things had to be established: That the defendant had assigned, removed or disposed of his property with intent to defraud his creditors, and that the defendant fraudulently contracted the debt or incurred the obligation respecting which suit is brought. By the fourth section of the act, it is enacted that "no warrant shall issue unless satisfactory evidence be adduced that there is a demand due to the plaintiff from the defendant for which the defendant, according to the provisions of this act, cannot be arrested or imprisoned. By the fourth subdivision of section 179 of the Code, the defendant may be arrested when he has been guilty of a fraud in contracting the debt or incurring the obligation

for which the action is brought. The general term of the supreme court (*Short* agt. *Berry*, 39 *How.*, 315), decided that in an action to recover money, it matters not whether the remedy is in equity or law, the defendant may be arrested, provided the facts stated in the complaint, or sworn in the affidavit, bring the case within one of the subdivisions of section 179 of the Code. In looking at the judgment roll in the original action, it is plain that the warrant herein should not have been granted, for the defendant could have been arrested in the original action, and if so, he cannot be prosecuted under the "act to abolish imprisonment for debt." Section 262 of the Code provides: "No person shall, on examination pursuant to this chapter (proceedings supplementary to execution), be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question on the ground that he has, before the execution, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used in evidence against him in any criminal proceeding or prosecution." In *Lathrop* agt. *Clapp* (40 *N. Y.*, 332) the court says: "This enactment was undoubtedly made to give a more full examination than could be obtained without it." The party was relieved from the pains and penalties to which his evidence might otherwise tend to subject him. The only criminal fraud the court says that it is aware of, that could reach a case like this, are those imposed by section 3, title 6, chapter 1, part 4 of the Revised Statutes (3 *R. S.*, 971, *and sec.* 39; 2 *R. S.*, 133, the latter section being the twenty-sixth section of the non-imprisonment act). The act of 1831 provides (*secs.* 42, 29), that no person shall be excused from answering any bill in equity seeking a discovery in relation to any fraud prohibited by this act, or from answering as a witness in relation to any such fraud, but no such answer

shall be used in evidence in any other suit or prosecution." BRONSON, J., referring to the last section, says, the language of the section is very broad: "The defendant was bound to make the discovery for the purpose of advancing the remedy of the creditor, but the answering could not be used as evidence against him in any other proceeding. The court erred in admitting the defendant's examination (*The People* agt. *Underwood*, 16 *Wend.*, 546). The supplementary proceedings referred to fall within the provision of this section, for they are intended as a substitute for creditors' bills, and must be regarded as in the nature of those suits in equity. The evidence of defendant's examination in the supplementary proceedings relative, to the very frauds prohibited by this act, cannot be used against him in this proceeding. The evidence, therefore, must be rejected, and without it the warrant should not have been granted."

STEUBEN COUNTY COURT.

HENRY JENNINGS, claimant, respondent, agt. BERTHA NEWMAN, owner, appellant.

JAMES NEALE, claimant, respondent, agt. BERTHA NEWMAN, owner, appellant.

Mechanic's lien — evidence of filing notice — form of judgment.

A copy of the notice of claim required by the mechanics' lien law to be filed in the county clerk's office, when certified by the deputy clerk, under the county seal, is entitled to be used in the same manner as if certified by the clerk himself. It is in effect the act of the clerk by his deputy.

A copy of notice of mechanic's lien, in which the signatures are not proved or acknowledged, is not, though certified by the county clerk, admissible as evidence of the due filing of the proper notice of lien (*Following Sampson* agt. *The Buffalo, &c., Railway Co.*, 4 *N. Y. Sup. Ct. Repts.*, 600; *S. C.*, 2 *Hun*, 512.)

A judgment in the ordinary form of a judgment of a justice of the peace, in an action upon contract, is in legal effect a judgment establishing the lien as required by section 11 of the mechanic's lien law.

March, 1876.

APPEALS from judgments of a justice of the peace upon claims under the mechanic's lien law.

Jas. H. Stevens, for appellants.

Wm. C. Windsor, for respondents.

SPENCER, *County Judge*. — Upon the trial before the justice, claimant offered in evidence a copy, certified by the deputy

clerk under the county seal, of the notice of claim filed in the clerk's office. This was objected to by the defendant on the ground that the certificate purported to be made by A. E. Baxter, county clerk, while it was signed by the deputy clerk.

This objection was properly overruled. The certificate was in fact made by an officer authorized by law to make it (1 *Statutes at Large*, 349, *sec.* 58), and was duly authenticated by the county seal. It was, in effect, the act of the clerk by his deputy (*Lynch* agt. *Livingston*, 6 *N. Y.*, 430).

The further objection was taken, in substance, that neither the notice or its filing could be proved by a certified copy. The mechanics' lien law (*chap.* 489, *Laws of* 1873) authorizes the claimant to file in the clerk's office of the county where the property to be affected is located a notice in writing specifying the amount of his claim, the person against whom it is made, the name of the owner or party in interest, and the situation of the building on which the labor was done, or for which the materials were furnished constituting the claim.

The statute (1 *Statutes at Large*, 350, *sec.* 65) makes copies, certified by the clerk, of all papers filed in his office, evidence to the same extent that the originals would be if produced. It is to be observed that no objection is taken to the sufficiency of the notice if properly proved, but only that the certificate or certified copy is not evidence of the contents or genuineness of the notice. The test of this objection is what the original, if produced with evidence of its filing, would prove. It would certainly establish that there was on file in the proper office a notice of claim purporting to be given by the claimant in this case, and having, so far as form and contents are concerned, all the requisites to constitute a valid claim and lien. The statute does not require the notice to be signed; but if that were necessary the notice in this case contains in the body the full name of the present claimant as the party giving it, and the initial of the Christian and full surname appears signed at the end of the notice. There

would be no necessity of proving this signature genuine or that the notice was in fact filed by the claimant. It is enough that a notice in his name, authorized by law, is found on file. By bringing this action, founded upon it, he adopts it as his own (*Hoyland* agt. *Bill*, 36 *Barb.*, 57; *Dodge* agt. *Lambert*, 2 *Bosworth*, 570).

The identity of the person named in the notice with the claimant, is presumed from the identity of the name (*Jackson* agt. *Gors*, 13 *John.*, 518; *Jackson* agt. *King*, 5 *Cowen*, 237; *Jackson* agt. *Cady*, 9 *Cowen*, 140). The paper being one which claimant was authorized to file, and being found so filed, the presumption is that it was filed by him (*Jackson* agt. *Phillips*, 9 *Cowen*, 94; *The People* agt. *Halburt*, 44 *Barb.*, 126; *Burdick* agt. *Winan*, 44 *Barb.*, 226). For the purpose of this proceeding it would have been sufficient to produce from the proper custody, and the claimant was entitled to read in evidence, without further proof, the notice of claim in question. It follows that a certified copy is competent evidence of the contents of the notice, of the paper constituting the notice. The certified copy is also evidence of the fact and date of filing. The statute (2 *Statutes at Large*, 404, *sec.* 63) provide that the county clerk shall receive and deposit in his office all papers and documents which shall be offered for this purpose, and (*sec.* 64) that the same shall be properly indorsed so as to indicate their general character and the names of the parties thereto, and shall be filed by the officer receiving the same, stating the time when received; and (*sec.* 65) that they shall not be withdrawn, except on the order of some court of record, for the purpose of being used as evidence in such court and then returned; nor delivered without such order to any person, unless upon the written order of the person or persons who deposited the same, or their executors or administrators. The indorsement of the time of filing a paper is an official act and becomes a part of the paper filed, and a certified copy is equally evidence of the fact and time of filing as of the contents of the paper itself.

The position taken by the appellant, that the owner paid the contractor in full before the lien was filed, is not sustained by the evidence. No payment had in fact been made of the debt to Sheldon Bros. for materials amounting to $283.85. There was no such substitution of the owner in place of the contractor as the debtor of Sheldon Bros. as would operate as a payment by the contractors. I do not find that there was any arrangement whereby the latter was exonerated from their liability for that debt until at least the giving of the note by the owner, which was long after the lien was filed. The arrangement simply was that the owner should discharge her liability to the contractor by paying their debt to Sheldon Bros. While the latter assumed to accept payment from the owner, they did not consent to discharge the contractors.

The judgment is in the ordinary form of a judgment of a justice of the peace in an action upon contract. The lien law (*sec.* 11) provides that upon default judgment shall be entered establishing the amount of the lien. The proper form of judgment in this case would doubtless be something like the following:

I have this day (October 4, 1875) rendered judgment in favor of Henry Jennings, claimant, against Bertha Newman, owner, defendant, establishing the lien of said claimant against said owner at $34 82
Costs 6 10

Judgment $40 92

But I think the judgment rendered is in legal effect a judgment establishing the lien. It must be regarded as having reference to the previous proceedings and the issue formed by the notice and answer. When the claimant's damages are ascertained, the law establishes the sum as the amount of the lien, and determines what execution shall issue.

These views would lead to an affirmance of the judgment, but as the supreme court at general term in this department (4 *N. Y. Sup. Ct. Rep.*, 600) has decided in a case like this, that notice of a claim under the mechanic's lien law cannot be proved by a certified copy, I am bound by an authority which I am not at liberty to disregard, to reverse the judgment in this case for the error, according to the decision in the admission of such certified copy. I am induced to believe, however, that the decision referred to was made without a due consideration of the nature of the instrument sought to be proved or to the statutes relating to the proof of documents in public offices by certified copies.

Judgment reversed.

NOTE.— We concur in the belief expressed by the county judge at the close of his opinion, that the decision in *Sampson* agt. *The Buffalo, &c., Railway Co.* (4 *N. Y. Sup. Ct. Reps.*, 600), and on the authority of which the judgment in this case is reversed, was made without a due consideration of the nature of the instrument sought to be proved, or to the statutes relating to the proof of documents in public offices by certified copies, and we think his reasoning, together with the statutes cited in the opinion, fully justifies this belief.

N. Y. SUPERIOR COURT.

PETER ROBERTSON agt. JAMES GORDON BENNETT.

Pleading — demurrer — answer — amendment.

After the service of a demurrer any time before the expiration of twenty days, it may be substituted by an answer as an amendment.

Special Term, January, 1877.

William W. Badger, for plaintiff.

John Townshend, for defendant.

SPEIR, *J.*—Motion that the plaintiff's attorney accept an amended answer after the service upon him of a demurrer to the complaint, under section 172 of the Code. The action is for an alleged libel. The defendant served the plaintiff with a demurrer to the complaint. Eleven days after the service, the defendant served the plaintiff with an answer withdrawing his demurrer. The plaintiff returned the answer, claiming that he had noticed the case for argument on the demurrer. Defendant claims that the demurrer is a pleading, and that he had the right to amend any time before the expiration of twenty days. I am not aware that the practice in such a case has been the subject of any adjudication, and none has been furnished me. The right to amend is absolute. This court decided (*Mason* agt. *Whitley*, 4 *Duer*, 611) that a complaint might be amended, although the amendment amounted to a new and distinct cause of action that can properly be united in the complaint. And it has been broadly held that

the only limitation upon the right to amend or upon the nature of the amendments to be made is that it shall not be done for the purpose of delay, nor under such circumstances as to prevent a trial at a "term for which the cause is or may be noticed." These objections are not alleged to exist. No delay has been occasioned by the amendment. In the case of *Hollister* agt. *Livingston* (9 *How.*, 140), it was decided that the amendments under this section are restricted to the matters of the original pleadings. This decision has in later cases been overruled, and it has since been decided that the defendant may serve an amended answer containing an entire new and different defense from that contained in the original answer. It seems to me, adopting the later interpretations of the statute — that the plaintiff may amend by adding a new count or cause of action, and that the defendant may amend his answer, containing a new and different defense from that contained in the original answer — it must follow that the answer must be received as an amendment in the place of the demurrer. The defense in one case is that the complaint contains no cause of action, and in the other a denial of the allegations in the complaint. As the plaintiff put his case on the demurrer calendar, he must have costs of the motion.

Motion granted.

COURT OF APPEALS.

THE PEOPLE *ex rel.* AUGUSTUS MILLER, appellant, agt. THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF NEW YORK, respondents.

Certiorari to review proceedings and judgment of removal of relator from the office of sergeant of police.

Upon a common-law certiorari the supreme court is not restricted to the jurisdiction of the inferior tribunal over the parties and the subject-matter, but it is the duty of the court in addition thereto to examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether in making it any rule of law affecting the rights of the parties has been violated.

A member of the police force of the city of New York can only be removed by the board of commissioners after written charges have been preferred against him, and after the charges have been publicly examined into, upon reasonable notice to him, and in such manner as the rules and regulations of the board of police may prescribe.

On the 5th day of February, 1875, notice of the charge, together with a copy of the charge and specification, was served upon the relator, which notice stated that the trial would take place at the office of the board of police on the 10th day of February, 1875. The relator admitted due personal service of the charge, specification and notice of trial, and he also signed the following admission: "I hereby admit the within charge as specified, and waive trial thereon." On the eighth day of February, two days before the trial, the relator delivered to the commissioners a sworn statement, denying his guilt, recanting and withdrawing the admission previously made, revoking the waiver of trial, denying and fully answering the charges, and fully explaining the reason why, and the circumstances under which the admission was made.

Held, that the board of commissioners were guilty of error in refusing to consider the explanatory affidavits submitted by the relator, and in removing him from his office on the strength of an admission which he

never intended to make, and which he withdrew before the day appointed for the trial and examination of his case. There was no trial or examination, and the dismissal was illegal.

THIS cause was heard at the first department, May general term, 1876, before NOAH DAVIS, P. J., CHAS. DANIELS and ABM. R. LAWRENCE, JJ. The facts fully appear in the opinions.

Louis J. Grant, for relator.

Chas. F. McLean, for respondents.

DAVIS, *P. J.* — In *The People ex rel.* agt. *Smith*, GROVER, J., said: "Whatever may have been the conflict of authority heretofore upon the question whether, upon a common-law certiorari, the court can inquire into any thing beyond the jurisdiction over the parties and subject-matter, it must now be regarded as settled in this state that it is the duty of the court, in addition thereto, to examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication, and whether, in making it, any rule of law affecting the rights of the parties has been violated" (*People ex rel.* agt. *Smith*, 45 *N. Y.*, 776, 777; *People* agt. *The Board of Metropolitan Police*, 39 *N. Y.*, 506; *The People* agt. *The Assessors of the City of Albany*, 40 *N. Y.*, 154). An examination of the published reports of the court of appeals since the 45 *N. Y.*, fails to disclose that these cases have been reversed. There can be no doubt that the board of police commissioners had jurisdiction of the subject-matter and of the person of the relator. He was a member of the police of the city. A charge had been lodged against him on the 4th day of February, 1875, in due form, charging him with neglect of duty. This charge was accompanied with a specification stating the particular offense, which, if true, was just ground for removal On the fifth day of February, a formal notice of the charge

with a copy of the same and of the specifications, were served upon him personally, whereby he was notified and required to answer the charge in accordance with and in the manner required by the rules and regulations for the government of the police force; and that his trial upon said charge would take place at a meeting of the board to be held at the office, No. 300 Mulberry street, in the city of New York, on the 10th day of February, 1875, at one o'clock P. M., and continued, as ordered by the board, until concluded. The relator admitted, in writing, due personal service of all these papers; and he also, afterwards, signed a separate paper, indorsed on said notice, charges and specifications in these words:

"I hereby admit the within charge as specified, and waive trial thereon."

On the eighth day of February following, he made a statement, addressed to the board, verified by his oath, and accompanied by the affidavits of four other persons, which substantially denied the charge and specification, and which, if true, ought to have secured his acquittal. On the tenth day of February, the board met for the trial of the relator at the time and place designated in the notice, and, at one o'clock of that day, the relator was called but failed to appear, and thereupon the board, as stated in their return, proceeded to hear, in the absence of said Miller (the relator) the proofs and allegations in support of said charges, to wit, the hereinbefore mentioned admission of said Miller of the truth of said charges. On the twelfth day of February, the relator presented his petition asking leave to withdraw his admission and for a trial of the charge; and at a meeting of the board on the 16th of February the petition was denied, and the board proceeded to pronounce a formal conviction and judgment of removal. It is clear that no other evidence was produced against the relator than his written admission of guilt, and the question is, whether that was sufficient evidence, on his failure to appear and answer at the trial, to

justify his conviction. I am at a loss to see why the admission was not evidence. His subsequent verified denial, and the affidavits accompanying the same were competent evidence of the truth of the facts stated in them. The commissioners were not bound to receive nor treat them as such. It was the relator's duty to have appeared on the trial, which he had ample opportunity to do, and to produce his witnesses for examination and cross-examination in due form. It does not appear that, if he had appeared and asked for the examination of his witnesses, and for a complete trial, without regard to his admission, the board would not have allowed it. Even on such appearance, the admission would have been evidence against him proper to be considered, but we cannot judicially say that the board, notwithstanding the rigid rules they subsequently applied to his case, would not have allowed him *then* to withdraw or explain the admission, and to disprove the charge by the production of his witnesses. By not appearing he was in default, and sufficient evidence was given by his admission to convict him on such default.

The subsequent refusal to open the default and let him into a formal trial upon the withdrawal of the admission seems to have been severe and unnecessarily harsh, but it was an appeal to the conscience and discretion of the commissioners (not to ours), and if their denial seems to the court unreasonable, that is no legal ground for its reviewal on certiorari. It was a matter of practice in the order and detail of the proceedings, and not reviewable by us. The subsequent efforts to get a re-hearing, and the refusals to grant the same, though not to be commended, are not in our province to review. The questions which we can review are the jurisdiction of person and subject-matter, and whether at the trial competent evidence was given tending to prove the charges, and sufficient to justify a conviction; and unless we can hold that a written admission of the truth of the charge and specification signed by the party accused is no evidence, or that it has become no evidence because a contra-

dictory statement and separate affidavits have been presented by the accused previous to the day of trial, but which he does not appear to maintain on the trial, we are forced to the conclusion that it is our duty on this writ to affirm the proceedings. It is not to be inferred that I intend to justify the manner in which the commissioners dealt with the relator, or even that I dissent very much from the views which my brother LAWRENCE has expressed concerning the proceedings. What I mean to say may be better expressed in the language of WOODRUFF, J., in *The People* agt. *The Board of Police* (39 *N. Y.*, *at page* 517), that to hold that "matters of mere detail in the order or mode of proceeding, not violating any rule of law to the prejudice of the party, and matters which are clearly submitted to the judgment or discretion of the inferior tribunal, where the evidence presents a case for its exercise, can be so reviewed" (by certiorari), would be in conflict with all the previous adjudications, and produce great inconvenience and embarrassment. I think the judgment of the board of commissioners must be affirmed, but, under the circumstances, without costs.

DANIELS, J., concurred.

LAWRENCE, *J.* (dissenting). — Prior to and until the 16th day of February, 1875, the relator was a sergeant of police in the city of New York, but on that day the respondents rendered a judgment removing him from his office. This certiorari has been brought to review the proceedings of the respondents, the relator in substance alleging that there was no investigation into nor examination of the charges. For a proper understanding of the case it will be necessary to recite somewhat at length the facts as they appear from the return filed by the respondents. In the return it is stated that on the 4th of February, 1875, a charge was made against the relator by an inspector of police, which charge, as detailed in the accompanying specification, was to the effect that the relator had been guilty of neglect of duty in this, to wit: "That said sergeant Augustus Miller was sitting in the back

room of the liquor store on the south-east corner of Sixtieth street and Eleventh avenue, coat and cap off, playing cards with roundsman Raynor, patrolmen Smith and Leavy." That on the 6th day of February, 1875, notice of the charge, together with a copy of the charge and specification, was served upon the relator, which notice stated that the trial would take place at the office of the board of police on the 10th day of February, 1875. The relator admitted due personal service of the charge, specification and notice of trial, and he also signed the following admission: "I hereby admit the within charge as specified and waive trial thereon." It also appears by the return that on the 8th day of February, 1875, two days before the trial, the relator delivered to the commissioners a sworn statement showing, among other things, that the bar tender of the liquor store, on the evening in question, hailed the relator while on duty and stated that Mr. Maher, the keeper of the store, wished to see him on important business; that Maher had been unfriendly to the relator, and that the relator not wishing to go into the store alone on account of such unfriendly relations rapped for officer Leavy, and upon being joined by him relator told Leavy that he wished him to go along, that Maher wished to see relator; that subsequently, just as the relator and Leavy were going into Maher's, they met officer Smith whom the relator also directed to accompany them; that the three police officers went into a rear room where Maher was sitting at a table alone; that Maher had commenced to tell the relator of the trouble he had had with some cattle drivers at the new cattle yards opposite to his store when roundsman Raynor came in, and that relator stated to him that he had called the other two men into the place; that within two minutes inspector McDermott came into the room and ordered them all out; that he (relator) said to the inspector, "This is a put up job, is it not?" to which the inspector made no reply. The relator concludes this statement by submitting the case to the board, but states that he distinctly denies that he is guilty of

the charges made against him and asserting that the other officers were there by his request and orders; and he denies that they were engaged in playing cards as alleged by McDermott. Accompanying the statement of the relator are the affidavits of officers Raynor, Smith and Leavy, and of Thomas Maher, which corroborate the statement in most, if not all, of its essential features and which go to show that there was no liquor drank and that there was no card playing by the relator or the other officers. All of these papers were laid before the respondents on the 8th day of February, 1875, as is admitted by the return. On the tenth day of February, as the return states, the relator was called but failed to appear "and the said board of police thereupon proceeded to hear, in the absence of said Miller, the proofs and allegations in support of said charges, to wit, the hereinbefore mentioned admission of said Miller of the truth of said charges." It further appears that on the 12th day of February, 1875, the relator submitted a formal petition to the board in which he stated that he "specifically and emphatically denied all and each and every of said charges as specified by McDermott, excepting only the fact that I was in the store mentioned by him, but my presence there I can fully and satisfactorily explain," &c. In this petition the relator also states that the first intimation of the charges, as specified in the notice, was when the notice was served upon him. He also avers that thereupon he waited upon one of the members of the board and explained fully and fairly to him the fact only of being in the store, and thereupon the commissioner (in the language of the petition) "*in my interest, as he stated, advised me to sign the formal printed waiver of the trial and admission of the charge.*" The relator thereupon prayed that the board would permit him to withdraw and revoke his admission and waiver of trial and would give him a speedy trial, &c. This petition was verified by the oath of the relator. His counsel also, on the 13th of February, 1875, by note informed the clerk of the commissioners that he had been retained and requested

that notice of the trial might be served on him. The board, on the sixteenth of February, denied the petition of the relator and found the relator guilty and dismissed and removed him "from the office of sergeant," &c. On the same day a formal judgment of removal seems to have been entered in the minutes of the board in which, while it is recited that the board had publicly heard the proofs and allegations in support of said charges, it is also stated that the said Miller having admitted the truth of said charges, and a full opportunity to be heard in his defense having been afforded to him and due deliberation being thereupon had, it is found that the said Augustus Miller is guilty of the charge so made as aforesaid.

There was subsequently to the making of the return by which these facts appear an order made by the special term of this court directing the respondents to file a further return to the writ containing a petition of the relator dated April 20th, 1875, and addressed to the respondents, and an affidavit verified by the attorney of the relator April 19th, 1875, together with any further proceedings and papers which the respondents might choose to put therein, without prejudice to the right of either party to object to the materiality of any of the papers returned. This petition, after reciting the facts, merely prays that the board will reconsider their previous judgment; and the affidavit of the relator's attorney, Mr. Grant, which accompanied such petition, went to show that notice of the meeting of the 16th of February, 1875, at which relator was removed, had been promised to the relator's counsel, and that it had also been agreed by the police commissioners that the petitioner should be allowed to withdraw his waiver, and should be permitted to be heard in his defense. Both these papers are incorporated in the additional or further return. There were also returned affidavits made by Mr. Hawley, the chief clerk of the respondents, and by commissioners Voorhis and Disbecker. The affidavits of Messrs. Voorhis and Hawley tend

to contradict the affidavit of Mr. Grant, the relator's attorney, in respect to the statements relative to any agreement to hear the relator or to notify his counsel. The affidavit of commissioner Disbecker explains the interview between him and the relator on the fifth of February, the day on which the charges were served, and the alleged advice to the relator was given. The affidavit seems to me, however, only to show that the relator admitted that he had been found in a liquor saloon while on duty, and that he could not deny that fact. It should be observed that the relator, in his petition on which the writ of certiorari was issued herein, states that when commissioner Disbecker advised him to submit the case, he stated to the commissioner that he would not like to do so without making a statement, to which the commissioner replied, "you can make any statement you like;" and, as has already been stated, a statement under oath was made to the commissioners on the eighth of February, two days before the time appointed for the trial, which statement forms part of the first return. The main question in this case is as to the power of this court to interfere in this matter. Formerly it was held that upon a common law certiorari the supreme court could not examine further than to see whether the inferior tribunal, whose proceedings were sought to be reviewed, had kept within its jurisdiction as to parties and subject-matter. Latterly, however, this strict rule has been departed from, and the law, as it is at present administered on common-law writs of certiorari, is stated by justice GROVER, in the case of *The People* agt. *Smith* (45 *N. Y.*, 776, 777) to be as follows:

"Whatever may have been the conflict of authority heretofore upon the question, whether upon a common-law certiorari, the court can inquire into any thing beyond the jurisdiction of the tribunal over the parties and the subject-matter, it must now be regarded as settled in this state that it is the duty of the court, in addition thereto, to examine the evidence, and determine whether there was any compe-

tent proof of the facts necessary to authorize the adjudication made, and whether in making it any rule of law affecting the rights of the parties has been violated."

The application of these principles to the case at bar very clearly leads, in my opinion, to the conclusion that the judgment of the respondents in removing the relator should be reversed. Before the case came on for trial, the relator submitted to the respondents a written statement, verified by his oath, explaining the circumstances under which he entered the liquor store of Maher, and which statement, if true, exculpated the relator from the charge of neglect or dereliction of duty. This statement (verified by the relator's oath) was corroborated by the affidavits of all the other officers, and also by the affidavit of Maher. It is quite apparent from the return that the commissioners did not examine, or if they did, that they gave no weight whatever to these affidavits nor to the relator's statement. It is also quite apparent from the return that the relator was held to and convicted upon his alleged admission of the truth of the charge made against him. Although it is recited in the judgment that the board has publicly heard the proofs and allegations in support of said charges, it nowhere appears that a single witness was examined before the board in support of the charges, and the recital is coupled with the further recital that the said Augustus Miller having admitted and answered said charges, &c., and the said Miller having admitted the truth of said charges. The whole proceeding is based upon the alleged admission of Miller, an admission which he explained and qualified, and, as I think, justified, two days before the matter first came on for trial. To say that a party accused, who has been led into an admission involving the sacrifice of the most sacred rights, cannot be allowed to qualify, modify or explain that admission at any time before it has been acted upon seems to me to be a mockery of justice. Throwing, then, out of view all the matters upon which the respondents are in conflict with the relator, and

conceding that no promise was given to the relator that he should be heard after he presented the petition of the 12th of February, 1875; conceding even that commissioner Disbecker did not make the statement to him which the relator claims he did; yet, as the fact remains, that the relator withdrew his admission, or qualified it, before the trial, the respondents were guilty of error in refusing to consider the explanatory affidavits submitted by the relator, and in omitting to give to them the weight to which they were entitled as uncontradicted evidence.. This is not, so far as appears by the record, a case in which there was conflicting evidence as to the guilt of the party accused. As the record stands on which the judgment of the 16th of February, 1875, was rendered, there is simply an unverified charge by McDermott on the one side, flatly contradicted by the affidavits of the relator and the other affiants on the other. It is not a case where the court is called upon to pass upon the mere weight of evidence. It is a case of no evidence on one side against positive evidence on the other. I am well aware of the rule that where there is evidence to support the judgment of the tribunal below, the court will not, on a certiorari, undertake to determine that such judgment is against the weight of evidence (*The People* agt. *Sanders*, 3 *Hun*, 17, 19, *and cases cited*). If I correctly understand this case, no such feature is presented here. The rule which obtains in the case of summary convictions may, it seems to me, be well applied in this instance. The question in such cases is, whether, conceding the jurisdiction of the magistrate, and the regularity of the proceedings, there was any evidence to warrant the conviction (*Mullins* agt. *People*, 24 *N. Y.*, 399). Here, throwing out the alleged admission of the relator, there was no evidence against him. It is true that a written charge had been made against him by inspector McDermott. That charge does not, however, appear in any manner whatever to have been verified. McDermott does not appear to have been examined as a witness in support of the charge;

no other party appears to have been examined as a witness in support of the charge. The relator, having under oath denied that he was guilty of the charge, and having shown, as I think (under oath), that all which he ever intended to admit was that he was present in Maher's liquor store under circumstances which were consistent with his innocence, there is not in this case, so far as I am able to discover, any evidence which warrants his conviction. If the respondents sought on the tenth day of February to hold the relator upon his supposed admission of guilt, they were bound in justice to give him the benefit of the qualification which he attached to his admission on the eighth of February. They were not authorized to accept part of his statement and reject the remainder. As the case stood on the tenth of February, the relator in effect said to the respondents, "it is true that on the 5th inst. I signed a paper which apparently admits my guilt. Such was not my intention. I intended only to admit my presence in Maher's liquor store. I deny that I am guilty of the charge brought against me by McDermott, with the exception that I was present in the liquor store. My presence there I can justify, and I am prepared to do so if afforded the opportunity." In the face of this, the commissioners found him guilty of the offense charged, on the ground that he had admitted that he was guilty. Until the maxim "*nemo tenetur prodere seipsum*" is obliterated from our law, the procedure of the respondents cannot, in my judgment, be upheld. One other observation should be made. It is utterly immaterial, as I view the case, as to what the negotiations and interviews between the relator's counsel and the respondents were after the 10th day of February, 1875. Whether the relator after that date made application to formally withdraw his admission of the fifth of February or not; whether he was promised a hearing or not — what was said or done in relation thereto is immaterial. The one bald fact stands out that the relator was removed from his office on the strength of an admission which he never

intended to make, and which he withdrew so far as it was capable of being construed as the respondents sought to construe it, before the day appointed for the trial and examination of his case. I have examined the cases referred to in the brief submitted by the respondents' counsel, and find nothing in them which militates against the views above expressed. If those cases are to be considered as holding that the action of such bodies as the police board is not liable to review by this court, they cannot be upheld under the recent decisions of the court of appeals above referred to (*See* 45 *N. Y.*, 777, *and cases cited by* GROVER, *J.*; *Mullins* agt. *The People*, 24 *id.*, 399). The judgment of the police commissioners should, I think, be reversed, with costs.

Judgment of commissioners affirmed.

From this decision an appeal was taken to the court of appeals, who reversed the judgment of the supreme court and the order of the board of police commissioners, judge ALLEN delivering the following opinion:

ALLEN, *J.* — The relator, as a member of the police force of the city of New York, could only be removed by the board of commissioners after written charges had been preferred against him, and after the charges had been publicly examined into upon reasonable notice to him, and in such manner as the rules and regulations of the board of police might prescribe (*Laws of* 1873, *chap.* 353, *sec.* 41). Whether the board had prescribed any general rules for the government of the force or for the examination of charges against members of the force, or, if so, what were the rules and regulations, does not appear.

The relator was entitled to a compliance with the statute, and to hold office until, after a public examination of charges made, he had been found guilty of some offense which should be deemed sufficient to warrant his removal. Charges were preferred and notice given of a time and place of hearing as

required by the statute, but there was no examination of the charges, and no inquiry into their truth by the board of police commissioners, either public or private. He was dismissed upon a written admission of the truth of the charges and a consent to waive a trial, not made to or in presence of the board, and without proof of the genuineness of the signature, except expressed by the statement, under oath, of the accused, in which he recanted and withdrew the admission, revoked the waiver of a trial, denied and fully answered the charges, and fully explained the reason why and the circumstances under which the admission was made. The admission was not before the board with the assent or by the authority of the relator, and the second statement was an answer to the charge and called for an examination, as if the admission had never been signed. The accused was not estopped by this admission, which was not made to the tribunal having jurisdiction, as his answer to the charges and his consent to waive a trial was revocable. The board do not profess to have acted upon the waiver, but claim to have examined into the truth of the charges, and held them proved by the admission. When the board of police convened on the day assigned for the hearing they had before them the withdrawal of the consent to waive the examination, and a demand of a trial, and the verified answer of the accused, corroborated by the affidavit of every other person present on the occasion, except the complainant. The accused did not appear in person or by counsel, and the board were therefore authorized to proceed and publicly examine into the charges and inquire into their truth in his absence, and *ex parte*. Instead of doing this, they ignored the documentary evidence before them and the revocation of the consent to waive the examination, and the sworn denial of the accused, and adjudged him guilty upon a paper not legitimately before them, taking it as the answer to the charge, notwithstanding the protestation of the accused that it was not his answer and was untrue. There was no trial or examination, and the dismissal was illegal.

Judge LAWRENCE has covered the case in his dissenting opinion, which obviates the necessity of any further discussion of the question.

It was important to the discipline of the force that the trials of members upon charges should be strictly legal, as that the authority of the law, when properly exercised, should be upheld.

For the reasons assigned by judge LAWRENCE, the judgment of the supreme court and the order of the board of police commissioners should be reversed, and the proceedings remitted for such further proceedings as may be lawful.

"All concur; FOLGER and EARL not voting."

SUPREME COURT.

THE PEOPLE, &c., *ex rel.* JAMES McKONE agt. ANDREW H. GREEN, comptroller, &c., and ALLAN CAMPBELL, commissioner, &c.

Mandamus to compel comptroller of New York city to approve a bond and sureties and the commissioner of public works to execute a contract.

The lowest bidder for a contract for public work in the city of New York is not absolutely and of right entitled to the contract until he has given adequate security, and such security has been passed upon and approved by the comptroller.

Where sureties, originally good, have become inadequate during the time the comptroller refused to act or pass upon their sufficiency, the commissioner of public works, under the city ordinances, may accept new sureties; but such acceptance is an act of grace and may be reconsidered and withdrawn, for good and sufficient reasons, at any time before the comptroller has approved of their adequacy and sufficiency.

Chambers, November, 1876.

On or about the 31st day of October, 1872, an ordinance was adopted by the common council and approved by the mayor, directing that Madison avenue, from Ninety-ninth street to One Hundred and Fifth street, be regulated, graded, &c. The relator was the lowest bidder for the work. His estimate or proposal was accordingly accepted by the commissioner of public works who notified him of such acceptance. Subsequently, the commissioner of public works transmitted the relator's bid or proposal, with the agreement of the sureties for the faithful performance of the work, to the comptroller for his approval of the security offered. The comptroller refused to signify his approval of the sureties and

returned the papers to the commissioner of public works, who then refused to enter into and sign the contract for the work. The relator then applied to the court of common pleas for a peremptory writ of mandamus directed to the comptroller and commissioner of public works, commanding the comptroller to approve the bond, if sufficient, and the commissioner of public works to sign the contract. The application was denied at special term, but, on appeal, the general term granted the writ as prayed for, and the court of appeals, in April, 1876, affirmed the order of the general term (*See People ex rel. James McKone* agt. *Green, Comptroller*, 50 *Howard's Practice Reports*, 500).

After the decision of the court of appeals the writ was issued. It was then found, that pending the proceedings theretofore had, the sureties first offered had, from various causes, become insolvent and unable to justify. New sureties were offered by the relator and accepted by the commissioner of public works, but the comptroller refused to approve of their adequacy and sufficiency for the same reason that he assigned for his refusal to approve the first sureties.

This application was then made for a peremptory writ of mandamus. Before a hearing was had the comptroller requested the commissioner of public works to withdraw his consent to the substitution of the new sureties, which request the commissioner was prevented from complying with. The order is referred to in the opinion.

Further facts appear in the opinion of the court.

James A. Deering, for relator.

William C. Whitney, counsel to the corporation, *George P. Andrews*, *T. B. Clarkson*, opposed.

LAWRENCE, *J.* — The point upon which this case turns is as to the right of the commissioner of public works, after once having consented to the substitution of a surety in place of the surety originally offered by the bidder, to withdraw

such consent before the comptroller has approved of the sureties. In this case, after a peremptory mandamus had issued out of the court of Common Pleas, directing the comptroller to pass upon the adequacy of the relator's sureties, it was found that both of the original sureties were not adequate, and thereupon, with the consent of the commissioner of public works, Messrs. Waterbury and Deering were proposed as new sureties by the relator.

This application was then made by the relator for a writ of peremptory mandamus commanding the comptroller to approve of the adequacy and sufficiency of such sureties, and the commissioner of public works to enter into and execute the contract for regulating and grading, &c., Madison avenue, which is mentioned in the affidavit. By the order to show cause, the comptroller was enjoined, in the mean time, from refusing to approve of the sureties to the commissioner of public works without his approval. By a subsequent order of the court the commissioner of public works was directed to take no action or proceeding in relation to the bid of the relator, or in relation to said contract, it being alleged, that the comptroller, in order to avoid the injunction, had requested the commissioner of public works to erase from the relator's bid, certain words, and to withdraw the bid or proposal of the relator from the comptroller's possession. By an order afterwards made, on the application of the commissioner of public works, through the counsel to the corporation, the relator was directed to show cause why the injunction against the said commissioner should not be vacated. The counsel for the relator contends that after the commissioner of public works has once assented to the change or substitution of sureties, he cannot withdraw his assent. I am unable to accede to this view and I do not think that the cases which counsel has cited sustain his position. The power to consent to such substitution is conferred by the 27th section article 2 of chapter 7 of the Revised Ordinances of 1866, which section prescribes "that every contract

for supplies or work, &c. * * * should be accompanied by a bond in the penalty mentioned in the proposals therefor, executed by the persons consenting to become bound as sureties, as provided in section 20, *or by such other persons as should be substituted therefor, with the consent of the head of the department making such contract, &c.*" No obligation is imposed upon the head of the department to give such consent. At the time that the relator applied to the commissioner of public works for leave to substitute Messrs. Waterbury and Deering for Messrs. Gilfoye and Prior, although he was the lowest bidder, he was not the lowest bidder "who had given security for the faithful performance of his contract, in the manner prescribed and required by ordinance, nor had the adequacy and sufficiency" of his security been approved by the comptroller. The relator was therefore in default, whether through his own fault or through that of the comptroller, it is not necessary now to determine. Conceding all that the learned counsel for the relator, in his most elaborate and instructive brief, claims as to the rights of the lowest bidder, whether under the charter of 1873 or the act of 1861, it is clear that the lowest bidder must give adequate security, and that such adequate security must be passed upon and approved by the comptroller before the lowest bidder becomes absolutely and of right entitled to the contract. Now, in this case, it appears that after the commissioner of public works had consented to the substitution of the new sureties in the place and stead of the old sureties, and before the approval of the adequacy and sufficiency of the new sureties by the comptroller, the commissioner became desirous "of reconsidering his approval of, or consent to such substitution," and in his affidavit he states that the reason why he desired so to reconsider his approval was because the work can now be done for $60,000, whereas, if the relator be allowed to execute the same under his bid, the expenditure, exclusive of surveyors' and engineers' fees, will amount to $120,000. The consent for the substitu-

tion of new sureties for those originally proposed is an act of grace on the part of the head of the department.

It rests upon no new consideration and it appears to me that if the head of the department becomes satisfied, before the act is consummated, by the comptroller's approval of the sureties, that he has acted unwisely or unadvisedly, it should be and it is within his power to withdraw his consent.

To illustrate: If the position of the learned counsel for the relator is correct, if the commissioner of public works has ascertained, within five minutes after he had consented to the substitution of the sureties, that they were worthless, he could not have revoked his consent, and the city would have been obliged to enter into the contract, unless the comptroller discovered the insolvency or irresponsibility of the sureties and refused to approve of them. I cannot conceive that such is a fair and reasonable interpretation of the provisions of the ordinance. It has been before observed that the cases cited by the learned counsel for the relator, do not appear to sustain the counsel's position that the commissioner of public works had no right to recall his consent when once given. Upon examining those cases I am of the opinion that it will be found that they were all cases in which third parties, on the faith of the act sought to be undone or revoked, had entered into obligations and agreements, into which they otherwise would not have entered. There the principle of estoppel applies. But in this case the relator contracted no obligation and he entered into no new contract on the faith of the consent of the commissioner of public works, to the substitution of the new sureties. He had made his bid several years before, and his sureties had been determined by the comptroller to be inadequate. When he came before the commissioner of public works, asking that new and other sureties might be accepted, he offered no new consideration and none passed from him to the city. Upon principle, therefore, and upon the authorities cited, as I understand them, I am of the opinion that until the comptroller had

actually passed upon the sufficiency of the new sureties the commissioner of public works was authorized to recall and revoke his consent to the substitution of sureties; and, as I cannot see that the plaintiff, by such revocation, will lose any legal rights to which he was entitled at the time the consent was obtained, and as it is apparent that much injury may ensue to those who would be assessed for the work if executed, I reach the conclusion that the order enjoining the commissioner should be vacated. The motion for a mandamus might, perhaps, be properly denied on the ground that the granting of the writ is much within the discretion of the court, and that regarding the expense to which property owners might be subjected, by the execution of the contract in question, it would be a wise exercise of the discretion of the court to refuse the writ and put the relator to his action against the corporation for damages. I prefer, however, to rest this case on the grounds heretofore stated, and as it is apparent that the commissioner desires to reconsider his consent, it follows:

First, that the order restraining him from such reconsideration should be vacated.

Second, that no case is made out for granting a mandamus, either to compel the comptroller to approve of the new sureties, or the commissioner of public works to execute the contract.

Motion is therefore denied, with ten dollars costs.

ALBANY SURROGATE'S COURT.

In the Matter of the Estate of PETER GOOSEBERRY, deceased.

When one possessed of personal property, dies, intestate, leaving no wife or descendant, parent, sister or brother, but leaves an aunt, and the children of deceased uncles and aunts, the aunt takes the entire estate under the statute of distributions as the nearest of kin, and is entitled to letters of administration; and in such a case no citation need issue to the cousins, as they have no interest in the estate of the decedent.

If several persons claim letters of administration and the verified petitions of each set forth that the deceased died intestate, and left personal property within the state, oral proof, upon the hearing, is unnecessary to show the intestacy of the deceased, or that at the time of death he had personal property within the jurisdiction of the court.

The question of the costs of the administrator establishing relationship to decedent, should be reserved until the final accounting.

January, 1877.

PETITIONS were presented to the surrogate of Albany county, for letters of administration upon the estate of Peter Gooseberry, deceased. One petitioner, Helen Simpson, claimed to be the aunt of deceased, and desired Marshal Tebbett to be associated with her in the administration of the estate. Another petitioner claimed as cousin of deceased. The other petitioners were creditors. Objection was made that a citation should issue to the non-appearing children of dead brothers and sisters of the decedent, and who were, therefore, cousins of Gooseberry, and conceded to be living. Testimony was then given tending to show that Helen Simpson had fifteen brothers and sisters, one of whom was the mother of Gooseberry, and all were dead. No oral proof

was given that the decedent left no will, or had assets in the state at the time of his death; and at the close of the testimony objection was made upon those grounds. Other material facts are stated in the opinion of the surrogate.

William J. Hadley for Helen Simpson.

Edward J. Meegan for McIntyres.

D. Cady Herrick for A. Myers, creditor.

James C. Matthews for J. H. Rouse, creditor.

ROGERS, *Surrogate.* — As to the preliminary objection that a citation should issue to the cousins of deceased, the *surrogate* ruled, that Helen Simpson, as aunt of deceased, was entitled to the entire estate, and that the cousins had no interest under the statute of distributions, and consequently no necessity exists of bringing them into court. (*a*)

After the testimony was closed the surrogate rendered his decision, as follows:

There are four petitions presented in this case, one by J. H. Rouse, who claims to be a creditor; one by A. Myers and John P. Cutler, claiming to be creditors; one by Robert and Adaline McIntyre, who claim as cousins of the deceased; and one by Helen Simpson, who claims to be an aunt of deceased.

(*a*) Kent says: "If the intestate leaves no wife or child, brother or sister, but his next of kin are an uncle by his mother's side, and son of a deceased aunt, the uncle takes the whole" (2 *Kent Com.* [12*th ed.*], 425, *citing Bowers* agt. *Littlewood*, 1 *P. Wms.*, 593; *Parker* agt. *Nims*, 2 *N. H.*, 460; *Parke* agt. *Asken*, 11 *Gill. & J.*, 346; *see, also, McClellan's Executor*, 117). No one is required to be cited unless entitled to an interest in the estate under the statute of distributions (1 *Bradf.*, 125, 200; 37 *Barb.*, 192). The statute of descents differs from the statute of distributions in reference to representation among collaterals, and does not prohibit it after nephews and nieces (2 *R. S.* [6*th ed.*], *p.* 1133, *et seq.* *See Hyatt* agt. *Pugsley*, 23 *Barb.*, 285; *Hannan* agt. *Osborne*, 4 *Paige Ch.*, 340).

The petitions in relation to the case are to be considered together, and considered as part of the case; and they all agree that, on the 29th day of November, 1876, Peter Gooseberry died, intestate;(*b*) that he left goods, chattels and credits in the State of New York to the value of $4,000.

The only question in issue is, who is entitled to administer the estate? The evidence shows that Peter Gooseberry, the deceased, did not leave any wife or children, or father or mother or sister or brother, and that the nearest of kin is Helen Simpson. I therefore adjudge that Helen Simpson is entitled to letters of administration, and that, under the statute, she can join any other person with her as administrator. I think that they should give bonds in the sum of $10,000. There is some difference of opinion as to whether the assets are $4,000 or $5,000; but I think it best to have the bond in $10,000.

Let letters issue to Helen Simpson and Marshal Tebbett.

Inquiry was made as to the costs and expenses of establishing the relationship of Helen Simpson, many witnesses being subpœnaed from a great distance, and the surrogate replied: I do not propose to pass upon that now; the statute prescribes that the reasonable costs of administration be paid out of the estate; but it is a question that must come up upon a final accounting.

(*b*) Death and intestacy must be proved to the satisfaction of the surrogate, and the party applying must be examined *on oath* in regard thereto. If the petition be *not* verified, an oral examination of the applicant, under oath, must be made (*Redfield's Law & Prac. of Surrs.' Courts, p.* 164 *note*), although it has been held that these requirements are directory merely (*Furley* agt. *McConnel*, 7 *Lans.*, 428).

SUPREME COURT.

ANN E. DEGRAAF agt. EZEKIEL TEERPENNING, personally and as surviving executor of the last will and testament of SOLOMON TEERPENNING, deceased, HELEN TEERPENNING, OLIVER J. TEERPENNING, SOLOMON TEERPENNING and SARAH E. KRAUS.

Will — Legacy — what will be deemed a satisfaction or ademption of a legacy — statute of limitation.

Where a parent or other person *in loco parentis*, bequeaths a legacy to a child or grandchild, and afterwards, in his lifetime, gives a portion or makes a provision for the same child or grandchild *without expressing it to be in lieu of the legacy, it will, in general, be deemed a satisfaction or ademption of the legacy.*

The legacy is to be considered a portion, and if the testator afterwards advances the *same sum* upon the child's marriage, or the happening of any other event, he is to be deemed to have done it to accomplish his original object in giving a portion. Under such circumstances it will be held to be intended by the testator as a satisfaction and not a double portion.

The presumption is that the legacy, where a payment to the amount thereof is made to the legatee, has been adeemed, and such presumption is conclusive unless overcome by proof.

This presumption may be overcome by evidence that such was not the intention, and when such evidence is offered it may be answered by other evidence of the same character. The whole question is one of intention.

By the will certain real estate was devised to the defendants, who were sons of the testator as tenants in common. Each of these devises was declared to be "upon this express condition, that he pay, or cause to be paid, such legacies, and perform such acts and pay such moneys as I shall herein enjoin upon him to perform." The legacy bequeathed to the plaintiff, Ann Eliza, by the will, and which is the subject of this litigation, is in these words: "Fifthly. I give and bequeath unto my

daughter Ann Eliza $400, to be paid unto her one year and one day after my decease, provided she has lawful issue, and if she has no lawful issue, then I order and will that my two sons pay to her the interest of the $400 yearly, and every year during her natural lifetime, and after her decease I give and bequeath the said $400 unto my surviving daughters, and their children, if they should have deceased, and if, and when she shall have issue, the money shall be paid to her." The codicil declares: "And whereas in my said last will I have given to my daughter the sum of $400, now, it is my will, that if my said daughter Ann Eliza die without lawful issue, then the same is hereby given to my daughters, and not to my sons, to be divided to my said daughters equally." The testator died October 6, 1847, and the will was admitted to probate November 6, 1847. On the day the codicil to the will was prepared the testator gave to his daughter, Ann Eliza, the plaintiff, the sum of $400 in money, saying to her, "take this as a present from your father." The husband of the plaintiff, at the same time, signed a note for it, but has never been called upon to pay the note. A similar sum was handed to the other daughters, accompanied with the same remark. The husband of the plaintiff, in the years 1848, 1849 and 1850, made a demand of the defendants, of the interest due his wife, which was refused, claiming that the legacy had been paid by the testator during his lifetime. This action was commenced in 1876.

Held, that the legacy was extinguished and paid during the testator's lifetime. The mere fact of taking the note of the plaintiff's husband was not inconsistent with the ademption of the legacy, the bequest of which legacy was never that of an absolute gift to the daughter, unless she had issue, but only of the income during life. Nor is the presumption of the ademption of the legacy overcome by the clause in the codicil.

The relief sought is a judgment of this court, that the legacy, together with accrued and accruing interest, is a lien upon the real estate of the defendants, and that the plaintiff is entitled to a decree of sale of so much thereof as shall extinguish the past interest, and obtain the principal sum of $400, which she asks shall be duly invested, that she may hereafter obtain the annual interest thereon, that in the end the ultimate payment of such principal in conformity with the will and codicil may be assured.

Held, that if the plaintiff is entitled to a judgment declaring that the legacy is a charge upon the realty (which seems very doubtful), she was so entitled to bring an action for that purpose, immediately after her demand in 1848 was refused. More than twenty years having elapsed since the right to bring such an action accrued, it is barred by the statute of limitations.

Ulster Circuit, October, 1876.

Degraaf agt. Teerpenning.

ACTION to have a legacy declared a lien and charge upon certain real estate.

D. M. De Witt, for plaintiff.

F. L. Westbrook, for Ezekiel Teerpenning.

C. A. Fowler, for other defendants.

WESTBROOK, *J.* — The plaintiff is the daughter of Solomon Teerpenning, deceased. The defendant Ezekiel is his son, the defendant Helen is the widow of another son, John S., deceased, and the remaining defendants are the children of said John S. and the grandchildren of the said Solomon Teerpenning, deceased.

The will of Solomon Teerpenning is dated July 23, 1840, and a codicil thereto bears date October 2, 1845. The testator departed this life October 6, 1847, and the will and codicil were admitted to probate by the surrogate of Ulster county, November 6, 1847. The defendant Ezekiel and John S. Teerpenning, deceased, were the executors thereof and qualified as such.

By the will certain real estate was devised to Ezekiel, certain other to John S., as tenants in common. Each of these devises was declared to be "upon this express condition, that he pay or cause to be paid such legacies, and perform such acts and pay such moneys as I shall herein enjoin upon him to perform."

The legacy bequeathed to the plaintiff, Ann Eliza, by the will, and which is the subject of this litigation, is in these words: "Fifthly, I give and bequeath unto my daughter Ann Eliza $400, to be paid unto her one year and one day after my decease, provided she has lawful issue at that time, and if she has no lawful issue then I order and will that my two sons pay to her the interest of the $400 yearly, and every year during her natural lifetime, and after her

decease I give and bequeath the said $400 unto my surviving daughters and their children, if they should have deceased, and if and when she shall have issue the money is to be paid to her."

Similar legacies were also made to other daughters.

The codicil declares: "And, whereas, in my said last will I have given to my daughter Ann Eliza the sum of $400, now it is my will that if my said daughter Ann Eliza die without lawful issue, then the same is hereby given to my daughters, and not to my sons, to be divided between my said daughters equally."

William H. Degraaf, the husband of the plaintiff, in the years 1848, 1849 and 1850, made a demand of John S. Teerpenning, deceased, as one of the executors of the interest due his wife, who refused payment thereof, and claimed that the legacy had been paid by Solomon in his lifetime, and that nothing would be paid by the executors except on legal compulsion.

The first question which this cause presents is, was the legacy to the plaintiff paid by the testator in his lifetime. The facts upon which the answer depends are these: In the will the personal property not specifically bequeathed to others was given to the sons Ezekiel and John S. Amongst the personal property which would so have passed was a bond and mortgage made by Palmer and wife, to Solomon Teerpenning, bearing date May 9, 1836, and recorded the same day, to secure the payment of the sum of $1,500 and interest. This was assigned on the 28th of August, 1845, for the consideration of $1,536.63.

On the day the codicil to the will was prepared, at the office of Peter Van Gaasbeck in Kingston, the plaintiff and her husband, Delilah Cole (another daughter), and wife of Henry Cole, and a third daughter, Rachel, who met their father at that place, were all present. The testator upon that day gave to the plaintiff the sum of $400 in money, saying to her, according to the evidence of her husband and also of

others then present, "Take this as a present from your father." Mr. Degraaf further said that at the request of Major Van Gaasbeck he signed a note for it; the form or precise language of which is not given, nor has he ever been called upon to pay it. A similar sum was handed to Mrs. Cole, the same remark being made to her, for which her husband also signed some paper. Subsequently, the daughter Rachel received the same amount of money from her father, the language being again repeated.

Whether an advance made by a father to his child is an ademption of a legacy contained in his will, is a question of intent. The rule upon that subject is thus stated in *Langdon* agt. *Astor's Executors* (16 *N. Y.*, 9; *see pages* 34, 35); "For instance, where a parent, or other person in *loco parentis* bequeaths a legacy to a child or grandchild, and afterwards, in his lifetime, gives a portion, or makes a provision for the same child or grandchild, *without expressing it to be in lieu of the legacy, it will, in general, be deemed a satisfaction or ademption of the legacy.* This is upon the ground that the legacy is considered a portion; and if the testator afterwards advances the *same sum* upon the child's marriage, or any other occasion, he does it to accomplish his original object in giving a portion. Under such circumstances it is held to be intended by the testator as a satisfaction, and not a double portion (*Story's Eq. Jur.*, *secs.* 1111, 1112). The relationship between the testator and the legatee creates a presumption of fact that the advancement was in the nature of payment, and was so intended. * * * This presumption may be overcome by evidence that such was not the intention; and when such evidence is offered it may be answered by other evidence of the same character. 'The whole question,' said lord chancellor COTTENHAM, 'is one of intention;' thus reaffirming a position which lord THURLOW had laid down nearly fifty years before (*Powys* agt. *Mansfield*, 1837, 3 *Myl. & Craig*, 359)."

It will be seen from the authority cited, and also from that

of *Hine* agt. *Hine* (39 *Barbour*, 507) that the presumption is that the legacy, when a payment to the amount thereof is made to the legatee, has been adeemed, and that such presumption is conclusive, unless overcome by proof. The counsel for the plaintiff relies upon two circumstances, and only two, to overcome such presumption; first, the giving of the note by the husband; and, second, the clause in the codicil.

First. It would aid the discussion very materially if the form of the note, if such it was, which Mr. Degraaf gave, was before us. Unfortunately this action has been so long delayed (nearly thirty years) that facts have been forgotten, and the individual who prepared the papers (Peter Van Gaasbeck, jr.) is dead. Some clew, however, is given in the form of an expression which was used by the father in handing the money to the plaintiff; it was declared to be "*a present*" to her from her father; and also in the declaration made by the deceased to John H. Schryver, one of the witnesses to the codicil, to whom the testator declared "that he had sold some property, and meant to make a disposition of that to his daughters while he lived." With these two significant declarations to guide us, and which are so fully established, it is hardly fair to assume that the testator immediately falsified his own words by turning the money, which at the instant of giving he declared to be a "present," into a loan made to the husband. Giving to the expression used at the time of the payment of the money the force fairly due to it, must we not assume that there was in the paper signed by the witness Degraaf nothing inconsistent with the avowed intent of the testator declared in the very act of giving, and that the paper signed also harmonized with the testator's scheme as evinced by the will and codicil, that the plaintiff should have the use of the money during her life, and yet, if she died childless, the principal to go as the codicil immediately executed declared. No other hypothesis will harmonize the spoken words with the prior and subsequent acts, and, as it does, upon well settled principles of law and of logic,

that hypothesis must be accepted as true. It was a present in any sense, even though a note had been taken which had obligated Degraaf to refund the money, provided his wife died without issue. By it, immediately, advantages were secured to the plaintiff, and she received a present benefit from her father's estate. The mere fact, then, of taking the note, if it was such an instrument, was not inconsistent with the ademption of the legacy; the bequest of which legacy was never that of an absolute gift to the daughter, unless she had issue, but only of the income during life.

Secondly, Neither is this presumption overcome by the clause in the codicil. If we are right in our conjecture as to the object and intent of the note or paper signed by the husband, as the testator had never intended Ann Eliza should have the $400 unless she became the mother of children, it was but reasonable, as he had made provision for the repayment of the advance upon the death without issue, to declare where the said $400 in that case should go. Such a declaration in the codicil became necessary to carry out the intent. It is also significant that whilst the will provides for the payment of interest to the plaintiff during life, no such provision is repeated in the codicil, but the principal is alone disposed of. Is not the reason obvious? Did not the plaintiff then have the money itself; and why should interest be paid by others upon the sum which she was herself enjoying?

From the facts, then, that an advance was made to the plaintiff by her father of the exact sum bequeathed, which, in the absence of contrary proof, is to be deemed an ademption of the legacy, that such advance was made from property willed to others in the original will, whose duty it would have been, had such advance not been made, to have paid the legacy, that the other daughters, to whom no property was specifically bequeathed by the codicil, also, during the testator's life, received from their father the identical amount of their legacies, and that another (Josephine), to whom the codicil devised certain real estate, received by such codicil a less sum

in money than by the will, and from the very long acquiescence by the plaintiff in the position of the executors that the payment to her by the testator was intended for an ademption of the legacy, I must hold that this legacy was extinguished and paid during the testator's life. As the share which the plaintiff would receive from her father's estate, even though this legacy was held to be unextinguished, would perhaps be only reasonable, I should have been better satisfied if my conclusions could be otherwise. Who should be the objects of Solomon Teerpenning's bounty, and the proportions of each, was, however, for him to decide. His intentions must prevail. When the law raises a presumption of his intention in making a gift, that presumption must be overcome by evidence. None has been produced, and on the contrary, all the surroundings evince to me very clearly that the $400 advanced to the plaintiff by her father was designed to extinguish the income upon that sum secured to her during life by the will, and the note or memorandum given by her husband was taken to meet the possible contingency of her death without issue. Whether or not in case the money should never be paid by Degraaf, those who are entitled to receive it upon her death without issue can have any claim upon the estate, is not now decided. It is enough to say, and to hold, that the plaintiff, having received this money herself for her use during life, is in no situation to ask that the sum of $400 should be invested for her benefit, and that she be paid the interest thereon during the years which have passed since the same was payable by the terms of the will. Less reluctance is felt in reaching the conclusion we have expressed, on account of the very long delay in bringing this action. This point has already been referred to, but it is worth a repetition. As early as the year 1848 the plaintiff had full knowledge of the position assumed by the executors. Twenty-eight years subsequently this action is brought to trial. Events have faded from memory, and the lips of some witnesses are sealed by death. The years that

have intervened testify with great force to the acquiescence of the plaintiff, in the position of those now sought to be charged. A decision in her favor would overturn the testimony which her conduct for more than a generation has furnished. It was well said by WILDE, J., in *Andrews* agt. *Sparhawk* (13 *Pickering*, 393, *see page* 400): "If a party will sleep over his rights for a great length of time, he must not be permitted to take advantage of his own laches, and to call for full proof, which it may be impossible for the other party to procure. Stale demands are not to be favored in a court of equity." The great good sense of these observations is so apparent as to need no comment. The silence and repose, which should ever follow a long lapse of time, must not now be broken by claims upon stale demands. Public policy and family peace alike forbid.

Thus far no attention has been given to the evidence of Lawrence C. Van Aken, a witness produced by the defendants. It is true that his presence in Kingston upon the day that the payment of the money was made is denied by other witnesses, but his general character is not impeached, nor is his evidence unreasonable. It is conceded that he was in the employ of Solomon Teerpenning at the time the codicil was prepared, and it is not unreasonable to suppose that he should, as he testifies he did, have driven the horse and wagon which carried the testator to Kingston. That such a fact would be better remembered by him, as it was his personal act, than by the others, is also apparent. With no personal interest in the issue of the action, it is difficult to conceive of a motive for false testimony in one bearing a good character, as he must, in the absence of impeaching evidence, be presumed to have. Mr. Van Aken says, that Mr. Solomon Teerpenning told him on his way to Kingston that "he was going to pay the girls their legacies, so as to do them some good." The witness further testified that the old gentleman afterwards told him, "he had given to Ann E. Degraaf and Delilah Cole their money, and had

taken their husband's notes to show." These statements harmonize so well with the whole transaction, and give such full force and effect to all that was said and done, that the truth of the facts contained therein, supported by the positive testimony of a living witness, must be assumed rather than the hypothesis of the plaintiff's counsel, which gives undue prominence to the taking of the alleged note, and ignores the force of the conceded language spoken at the very instant of the delivery of the money.

There is another objection taken by the defendant's counsel to the maintenance of this action, which it seems to me is equally fatal. The relief sought is the judgment of this court that the legacy, together with accrued and accruing interest, is a lien upon the real estate of the defendants, and that the plaintiff is entitled to a decree of sale of so much thereof as shall extinguish the past interest and obtain the principal sum of $400, which she asks shall be duly invested, that she may hereafter obtain the annual interest thereon, and that in the end the ultimate payment of such principal in conformity with the will and codicil may be assured.

It is unnecessary to discuss the question how far a cause of action for yearly accruing payments may be barred, and how many, if any, are now barred by lapse of time. The point is, can the plaintiff now have the judgment of this court, declaring that the legacy itself was made by the will a lien upon the real estate? The Code (*sec.* 97) provides: "An action for relief, not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued." It was held in *Bruce* agt. *Tilson* (25 *N. Y.*, 194, 196) that this section of the Code covers the same ground with section 52, page 301 of 2 Revised Statutes, which declared: "Bills for relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause of action shall accrue, and not after." If, however, the fact that this action is predicated upon a

will, a sealed instrument, takes it out of the operation of this section (*sec.* 90), which requires such an one to be brought in twenty years, is equally operative. This suit has not been brought in either ten or twenty years since a cause of action accrued, but a much longer period than either had elapsed when it was commenced. If the plaintiff is entitled to a judgment declaring that the legacy is a charge upon the realty (a very doubtful proposition), she was, certainly, so entitled to bring an action for that purpose after her demand in 1848 was refused, and which demand and refusal was repeated during the two immediately succeeding years. In *Bruce* agt. *Tilson*, before referred to, which was an action for specific performance of a contract for the sale and conveyance of real estate, it was also held: "The statute of limitations begins to run at the time the plaintiff might bring his equitable action, and is charged with notice that his right is denied; a new cause of action cannot be created by a subsequent demand of specific performance." No reason is apparent to me why that case and the statute do not apply to the one we are considering. We repeat, that the question is not whether any and all remedy to recover annual payments is barred, but the true one is, can this court, after more than twenty years have elapsed since the right to bring such an action accrued, decree that the will of Solomon Teerpenning, deceased, made the legacy, now sought to be enforced as such, a lien and charge upon the real estate of which the defendants are now the owners? The yearly payments can only be adjudged liens by deciding that the original bequest had such a character; and as the right of action to have that so declared accrued at a period long since terminated, the statute prohibiting its maintainance after that period applies with full force. In short, as the right to a judgment of this court enforcing and declaring the original legacy a charge upon the real estate is gone and barred by lapse of time, no judgment having such an effect can now be rendered. If the recent accumulations of interest, and those which may still

follow, are adjudged to be incumbrances upon the realty, and are enforced as such, the court would then necessarily determine now, what it could as well have done over twenty years ago, had a suit for that relief been then instituted, that by the will and codicil the testator, Solomon Teerpenning, deceased, made such a charge thereon. In no aspect which the case presents to us would such a judgment be either proper or legal. The plain language of the statute law of the state forbids it, and the relief asked for by the complaint must also, for this reason, be refused.

The result of our examination, then, is, that for the reasons that the testator in his lifetime, by payment to the plaintiff, extinguished the legacy to her, and that the relief sought, even though such ademption had not been made, is barred by the statute of limitations, the complaint of the plaintiff should be dismissed.

SUPREME COURT.

DUDLEY G. GAUTIER and JOSIAH H. GAUTIER, plaintiffs, agt. THE DOUGLASS MANUFACTURING COMPANY, THE RUSSELL AND ERWIN MANUFACTURING COMPANY and THOMPSON J. S. FLINT, impleaded, &c., defendants.

New trial — Newly discovered evidence — Surprise — Laches.

To furnish proper and sufficient ground for a new trial on the ground of *newly discovered evidence*, the same must have been discovered since the trial, and must be shown to have been out of the parties' power by diligence to have been discovered before.

It is only in a case of indispensable necessity that a party will be relieved by the granting of a new trial.

A motion for a new trial should be denied where it appears that the newly discovered evidence is partially cumulative, and where most of the witnesses by whom it is alleged that the newly discovered evidence will be given were examined upon the trial, and being in the employ of the defendants could have been examined, if due diligence had been used, and by a proper examination or cross-examination of those witnesses the facts now sought to be established could have been elicited.

Where a question asked a witness on the trial was excluded by the court as incompetent, and an exception thereto was taken, a new trial should not be granted to enable other witnesses to testify to the same matter. The ruling of the court in excluding the evidence should be passed upon by the general term on appeal.

A new trial will not be granted where the alleged "newly discovered evidence" is material only to impeach or *contradict* witnesses sworn on the former trial.

Motions for a new trial are addressed to the sound discretion of the tribunal before which they are heard, and if the moving party is overborne by the affidavits of his adversary, the court ought not, in the absence of evidence impeaching the character of the parties making such affidavits for truth and veracity, to disturb a judgment after hearing at special term.

Gautier agt. Douglass Manufacturing Company.

A refusal of the court to postpone the trial on account of the illness of a party to whom the defendants allege the management of the trial was intrusted, is a matter in the discretion of the justice who tried the cause, and should not be interferred with by another justice sitting at the same branch of the court, except where the discretionary power has been abused or most unwisely exercised; especially where the trial was by the court without a jury, in which case, under section 268 of the Code, an appeal lies directly to the general term.

June Special Term, 1876.

THIS action was commenced on the 18th day of November, 1874, by the service of the summons, and an order to show cause why a receiver should not be appointed, the latter being returnable December 1, 1874.

The motion for a receiver was from time to time adjourned, until the 27th day of January, 1875, when it was argued, and on the 30th day of January an order w s made and entered on said motion appointing a receiver in said action, unless the defendants deposit $50,000 in a certain trust company, to the credit of this action, and on the 1st day of February, 1875, such deposit was made by the defendants, in compliance with said order.

On the 29th of January, 1875, answers were served by the several defendants.

On the 11th day of March, 1875, plaintiff's attorneys filed a note of issue herein, and on the following day served a notice of trial for the April term following.

On the 21st day of April, 1875, the cause was called on the day calendar of the Special Term for trial, when an objection was made by defendant's counsel to proceeding, for the reason that the action should properly be referred, on the ground that an accounting was prayed for in the complaint, and that as a lien was claimed by the plaintiffs on certain property alleged to have been transferred to the defendants, an accounting would be necessary in order to ascertain what property, if any, had been so transferred, and its value; and another of the grounds being that as plaintiff's claim was based, among

other things, on an assignment of a residuary interest on said property, it would be impossible to ascertain what that interest was without an accounting. Plaintiff's counsel insisted that the motion for a reference should have been made at chambers upon notice. The justice then holding special term thereupon took the papers, stating that he would look at them and decide on the day following. On the 22d day of April, the said justice marked the cause off the term, stating that he would let the defendants make their application for a reference at chambers.

On the 21st day of May, 1875, plaintiff's counsel served on the counsel for the defendants a notice waiving the cause of action based on the residuary interest mentioned.

On the 29th day of May, 1875, the defendants' attorney served on plaintiff's attorneys a notice of motion for a reference based on an affidavit, the said motion being noticed for June seventh, following.

On the first day of June, plaintiff's attorneys served a notice of motion to restore this action to the calendar for trial, and on the eighth day of June an order was made and entered, placing this cause on the day calendar of June tenth for trial.

On the seventh day of June the motion on the part of the defendants for a reference was argued before his honor judge Brady, sitting at chambers.

On the ninth day of June an order was made and entered denying said motion for a reference, for the reasons stated in the following opinion:

Brady, *J.* — The plaintiffs declare, through their counsel, that their success in this action depends, first, upon the construction of the papers creating a trust mentioned in the pleadings, and that unless, under and by virtue of the construction given them, a lien results in their favor, this action cannot be maintained. The motion for a reference is therefore denied. It is conceded that if the lien is declared to exist, a reference to take an account will become necessary in

order to ascertain against what the lien may be applied. Motion denied for these reasons.

The cause finally came on for trial before Mr. Justice DONOHUE, at a special term of the supreme court on the 17th day of June, 1875, and lasted several days, a large number of witnesses being called and examined on both sides. The judge held the case for several months after the hearing before rendering his opinion, judgment being entered February 5, 1876, when the court rendered a personal money judgment against the defendants, the Douglass Manufacturing Company, the Russell & Erwin Manufacturing Company, and T. J. S. Flint, for $41,814.22.

A motion for a new trial was made on the part of the defendants, on the ground of surprise and newly discovered evidence, based upon numerous affidavits, and came on to be heard at a special term of this court before Mr. Justice LAWRENCE, on the 28th day of November, 1876, which was denied, the following opinion being rendered. Further facts appear in the opinion.

Owen & Gray, attorneys, and *John E. Parsons*, of counsel, for plaintiffs.

L. C. Ashley, attorney, and *L. R. Marsh*, of counsel, for defendants.

LAWRENCE, *J.* — I do not agree with the counsel for the plaintiffs that this motion should be denied on the ground that the defendants were guilty of laches in not making the motion at an earlier date.

The affidavit of Mr. Ashley, one of the counsel for the defendants, sufficiently excuses any apparent laches in that respect.

It is my opinion, however, that the motion should be denied, for the reason that the newly discovered evidence on the part of the defendants is partially cumulative, and on the further ground that most of the witnesses by whom it is

alleged that the newly discovered evidence will be given were examined upon the trial, and being in the employ of the defendants, could have been examined if due diligence had been used, and by a proper examination or cross-examination of those witnesses, the facts now sought to be established by the defendants could have been elicited (*Leavy* agt. *Roberts*, 2 *Hilton*, 285).

In *Floyd* agt. *Jayne* (6 *Johnson's Ch. Reports*, *p.* 479) Chancellor KENT held that it would be establishing a grevious precedent, and one of great public inconvenience, to interfere in any other case than one of indispensable necessity. This does not seem to be such a case.

The witness Swan was examined upon the trial, and the question as to the quality and character of the steel furnished by the plaintiffs was distinctly put to him, which question was overruled, and the defendants excepted.

If the court erred in excluding that evidence, the defendants have their remedy on appeal.

The other witnesses, by whom it is alleged that the defendants expect to prove that they are entitled to a rebate or offset on account of the unmerchantable or unfit character of the steel furnished by the plaintiffs, could only give evidence of the same kind, as to the quality of the steel as the witness Swan, and the question whether such evidence was competent at all being raised by the exception to the exclusion of Swan's evidence, a new trial should not be granted to enable those witnesses to testify. The competency of the evidence will and must be passed upon by the general term on the appeal upon the case made. If incompetent it cannot be received, even if there should be numberless witnesses who would give such evidence, and the right of the defendants to give such evidence can just as well be settled upon the rejection of the testimony of one witness and an exception thereto, as upon the exclusion of the testimony of many witnesses.

The witness Bruff was also examined on the trial, and the excuse given for not then examining him as to the points

referred to in the plaintiff's affidavits, for the reason that he had, or was supposed to have had, a bias against the defendants, affords no ground for granting a new trial.

The witness was sworn to tell the whole truth, and it cannot be presumed that if interrogated properly his bias, even conceding it to have existed, would have led him to have sworn falsely.

If there is any reason for supposing that he would have given a false statement of the contract with the plaintiffs, or of the course of dealing with them on account of such bias, the court surely cannot now be asked to give any weight to the affidavit which he makes in this motion.

Again, a party is chargeable with laches, who, previously to the trial, knew that the witness whose testimony he seeks to introduce as newly discovered evidence, must probably, from his situation and employment at the time of the transaction, the subject of the controversy, have been conversant with the facts in relation to such transaction and who yet does not examine the witness in regard to those facts (*People* agt. *Superior Court*, 10 *Wend.*, 285, 292).

In my opinion it is quite apparent, from the whole case, that the defendants must have known that Bruff would be a witness upon the trial, and certainly they knew, when he was put upon the stand, that he could testify as to what the agreement between the unincorporated Douglass Manufacturing Company and the plaintiffs really was. The defendants, in respect to the testimony of this witness, have not shown due diligence.

The witness Burdell was also examined on the trial, and testified that he was in the employ of the defendants, the Russell and Erwin Manufacturing Company, "to keep the accounts of the Douglass Manufacturing Company by themselves, and in a set of books entirely different from the Russell and Erwin Manufacturing Company."

This witness being in the defendants' employ, and known by them to have charge of the books of the Douglass Manu-

facturing Company, could and should have been interrogated by them as to the accounts between the plaintiffs and that Company, and the failure to do so was laches on the part of the defendants; and even if the defendants did not in point of fact know that he could have testified to the matters, which it is now alleged could have been proven by him, the affidavits of the defendants on this motion do not appear to me to excuse the neglect of the defendants in not ascertaining what evidence could be given by one who was in their own employ and in the same office in which the business of the Russell and Erwin Manufacturing Company was carried on.

This witness was called by the defendants, and there is no reason for supposing that he had any desire to exclude from their knowledge any facts or circumstances of which he was cognizant which might be beneficial to them in resisting the plaintiff's claim.

So far as this motion is based upon the refusal of the court to postpone the trial on account of the illness of Mr. E. E. Flint, and the injury alleged thereby to have been sustained by the defendants, the motion must be denied, because that was a matter which rested very much in the discretion of the justice who tried the cause, and with the exercise of that discretion another justice sitting at the same branch of the court should not interfere, save in a case where the discretionary power has been abused, or most unwisely exercised. Having read over the affidavits and the printed case very carefully, I do not think that in this case I should interfere. Besides, if the justice erred in the exercise of that discretion (as the trial was by the court without a jury), under section 268 of the Code, an appeal lies directly to the general term (*Martin* agt. *Hicks*, 6 *Hun*, 75, *and cases cited per* DAVIS, *P. J.*; 3 *Wait's Practice*, 77).

Where the exercise of a discretionary power, vested in one of the justices of the court, is sought to be reviewed, it seems to me much more fitting that such review should take place before a full bench than before a single justice.

Furthermore, the rule is that a new trial will not be granted where the alleged newly discovered evidence is material only to impeach or contradict witnesses sworn on the former trial (*Fleming* agt. *Hollenback*, 7 *Barb.*, 271).

If I correctly apprehend the nature of the evidence alleged to have been newly discovered, it is designed to contradict the plaintiff's evidence in regard to the agreement under which the steel in question was furnished and to show that there was another and a different agreement between the parties which the plaintiffs have violated in charging interest, and by failing to allow credits due thereunder to the defendants for scrap, and for defective steel returned. Evidence was given at the trial in respect to these matters, and the witnesses for the plaintiffs state that the Douglass Manufacturing Company was credited with steel returned.

Again, the affidavits on the part of the defendants are so thoroughly contradicted by those read by the plaintiffs as respects the newly discovered evidence as to preclude me from granting a new trial. These motions, as I understand the decisions, are addressed to the sound discretion of the tribunal before which they are heard, and if the moving party is overborne by the affidavits of his adversary, the court ought not, in the absence of evidence impeaching the character of the parties making such affidavits for truth and veracity, to disturb a judgment after hearing at special term.

The justice who tried this cause decided that so far as the goods made up were concerned, he would admit evidence to show the value of them; but he held that so far as related to the character of the steel, that is "a question to be determined hereafter," and he added: "If the court determines that is a question in the case that goes to a reference. At present I exclude any thing going to the quality of the steel to reduce the price." To this ruling the defendants excepted.

It must be concluded from the judgment which he subsequently rendered, that the justice determined that there was no question involving a reference in the case, and the defend-

ants not only have exceptions to his ruling in this respect, but also an exception to his refusal to find in accordance with the defendants' first request, "that the decision of this court at chambers, denying the defendants' motion for a reference in this case having been based upon the specific statement of the plaintiff's counsel on the hearing of said motion that a hearing of this cause was necessary for the purpose of obtaining a construction by the court, of the written instruments under which the plaintiff's lien is claimed, and that a reference of the case was to be had after obtaining such construction, it is not permissible, therefore, in the present hearing of the case to inquire into or decide upon the matters which, according to said statements, were to be examined before a referee."

If the justice erred either in the exclusion of evidence offered by the defendants to show the character of the steel furnished, or in refusing to order a reference, the exceptions of the defendants will bring up those questions for review before the general term, where the matter can be much more appropriately disposed of, than upon a motion for a new trial at the special term.

The motion is therefore denied, with ten dollars costs.

N. Y. SUPERIOR COURT.

MARGARET SARAH WALSH, an infant, by JOHN F. WALSH, her guardian, plaintiff, agt. LEWIS A. SAYRE, defendant.

Discovery — in action for malpractice against a surgeon, when an examination before trial of the parts operated upon, by surgical experts, will be ordered.

Courts of equity in compelling a discovery of books, papers and documents, proceed on the principle that it is against conscience that a party to a litigation having knowledge or the means by which knowledge could be obtained, of facts material to the litigation, should obtain an advantage to himself to the sacrifice of the development of truth, and consequent working of injustice by withholding and concealing such knowledge and means.

Held, that this principle clearly covers and authorizes the compulsory discovery, in a proper case, of *things or substances* other than books, papers, etc.

Where, in an action for *malpractice* against a surgeon to recover damages for an alleged unskillful operation performed by him on the body of the plaintiff, a child of about seven years of age, he, upon petition and affidavit, asked that the plaintiff be required to appear and submit to a personal inspection of the affected part by the defendant, and such other skillful and competent surgeons as he might name, under the direction of a referee appointed by the court for that purpose.

Held, that the court had power on such application to compel a discovery of the character of the one sought for, and that this was a proper case in which to exercise it, and accordingly ordered and directed an examination of the alleged injured part by expert surgeons appointed by the court for that purpose.

Special Term, October, 1868.

THE action is brought against the defendant, who is a surgeon, to recover damages for an alleged unskillful operation

performed by him on the body of the plaintiff, who is a child of about seven years of age.

The complaint alleges that the defendant was employed, in his capacity as surgeon, to treat the plaintiff for a swelling and injury in the neighborhood of one of her hips; that he performed an operation on the person of the plaintiff, but did it so negligently and unskillfully as to puncture the joint of the plaintiff, causing the synovial fluid which lubricates the cartilaginous surface of said joint to escape, thereby seriously and permanently injuring the hip, rendering the whole leg useless and permanently lame, and perhaps rendering necessary an amputation of the leg, at the risk of plaintiff's life. Damages to the amount of $20,000 are asked for.

The defendant, by his answer, alleges that plaintiff was suffering from an abscess on her body near one of her hips, which he, about March 10, 1868, operated on in a careful and skillful manner, and immediately after the operation carefully and skillfully bandaged and dressed the affected part, and denies all the allegations of negligence and unskillfulness contained in the complaint; and then sets up that, whatever injury may have come to the plaintiff since said operation, it was caused by the negligence of the plaintiff and her parents in not returning the plaintiff to the defendant, as requested, for further medical treatment.

The defendant now, upon the complaint and answer, and upon a petition setting forth that this action was commenced August 21, 1868; that plaintiff is a child about seven years old; also setting forth the substance of the contents of the complaint, and reiterating the matters contained in the answer; also setting forth that plaintiff's counsel alleges that this action is based upon the certificates of surgeons as to the injury; that since the commencement of this action he and his assistants have endeavored to obtain leave to make a professional examination of the affected part of the plaintiff, but have been refused permission so to do by plaintiff's parents; that he verily believes that it is requisite and absolutely neces-

sary, for the proper defense of this action, and to properly protect his good name and fame in his profession, that a personal inspection and professional examination of the affected parts should be had by him and such other eminent and skillful surgeons as he may deem necessary, and that without such personal inspection and examination he cannot properly defend this action nor safely proceed to trial, and praying that said examination and personal inspection by him and such other skillful and eminent surgeons as he may name may be had, under the direction of the sheriff or a referee appointed for that purpose, or at such time and place, and in such other form or manner as to the court may seem just and proper; moves that the prayer of the petition be granted.

Edwin James, for plaintiff.

P. J. Gage, for defendant.

JONES, *J.*—The question whether a surgical operation has been unskillfully performed or not is one of science, and is to be determined by the testimony of skillful surgeons as to their opinion, founded either wholly on an examination of the part operated, or partly on such examination and partly on information derived from the patient; or, partly on such examination, partly on such information, and partly on facts conceded or proved at the trial; or, partly on such examination and partly on facts conceded or proved at the trial.

The present action is brought on the faith of the expressed opinion of surgeons that the operation was unskillfully performed. This opinion is founded on the examination of the part operated on, and the natural presumption arising from the circumstances is, that it is also founded in part on statements made by the patient and her parents. To what extent, if at all, the judgment of these surgeons in forming their opinions was influenced by a bias created, unconsciously to themselves, by such statements, cannot now be determined. That must be left for the trial. It is, however, fair to assume on this

motion the possibility of the judgment having been swerved by such bias.

As the determination of the action depends on the judgment of skilled surgeons, the defendant will prosecute his defense under serious, if not disastrous disadvantages, if this motion be denied. For, in that event, he will have to combat the testimony of those surgeons who have already formed their opinions adverse to him, possibly under the influence of an unconscious bias, and who have not only so formed it, but expressed it, whereby, in the language of an eminent writer, "the expressed opinion has become as a fact to them who expressed it" (the meaning of which is that the mind of one who has expressed an opinion naturally exerts its utmost power and resources to sustain the opinion and refute all objections urged against it), by his own testimony alone, and that of his assistants present when the operation was performed, upon which testimony the usual criticism will, undoubtedly, be passed, viz.: As to himself, that he is a party in interest swearing to relieve himself from pecuniary responsibility and to preserve his reputation, and as to his assistants that they are not sufficiently skilled to have their testimony weigh against the plaintiff's witnesses.

There is no just reason why the defendant should be suffered to remain under this disadvantage when it can be easily avoided by a resort to the same means by which it was created.

While cases may occur where such ignorance or gross neglect is displayed that all competent surgeons would unite in condemning the operator, yet, in the present advanced state of surgical science, cases frequently happen where surgeons of the greatest skill will differ with each other in their diagnosis of the nature and character of the difficulty to be remedied, in their views as to whether an operation would produce a cure; as to whether it would be of some benefit to the patient, although not a radical cure; as to whether the amount of benefit to be gained would justify the performance of an operation; as to whether the operation could be performed at all

without destruction of life, and, lastly, as to the best mode of performing the operation.

Of course it cannot now be ascertained to which class this case will ultimately be found to belong; but on this motion, nothing appearing to the contrary, it must be assumed that the defendant has a fair prospect of succeeding in his defense, which cannot be if the action falls in the first class.

In a case, then, where skilled surgeons may honestly differ in their views, it is not proper that the cause should be left to be determined on the evidence of two or three surgeons selected by the plaintiff out of the whole body of surgeons, perhaps because their views are adverse to the defendant's; but it is eminently proper that defendant should have the benefit of the testimony of one or two surgeons of his own selection, and that these surgons should have the requisite means of forming a correct judgment, one of which is an examination of the affected part.

True, the plaintiff's witnesses may on the trial be examined as to the facts on which they formed their opinion, and may be called on to give a description of the part operated on, and it is suggested that upon the evidence thus given any number of surgeons whom the defendant pleases to call may found opinions.

I have, however, had sufficient experience in the trial of causes to know that witnesses, when giving a description, frequently honestly differ in material points.

This occurs sometimes by one fact or circumstance arresting the attention of one, while it escapes that of another, sometimes by an inaccurate measurement of distances either by the eye or instrument, more frequently, however, by the eye, and sometimes from a forgetfulness of some facts or circumstances, which forgetfulness frequently arises in consequence of the facts or circumstances so forgotten not at the time of their occurrence striking the mind of the witness as material, and, therefore, making no impression on his memory, although they are, in fact, most material.

The evidence of the plaintiff's witnesses will be open to all these defects, while that of surgeons selected by the defendant, who have prosecuted their examination with light afforded by suggestions offered by him as to the line of examination proper to be pursued, will (although it may in itself be liable to similar defects) bring forth all facts and circumstances which exist and are deemed material by them or by the defendant. Thus, each party having an opportunity to investigate and ascertain as to existence of facts and circumstances deemed by each to be material, every fact and circumstance bearing in the least on the subject will be ascertained and spread forth in the evidence, whereby other medical witnesses will be the better enabled to form a correct judgment, and the jury be the better enabled to arrive at the truth.

If the court has power on this application, to compel a discovery of the character of the one sought for, this is a proper case in which to exercise it.

Courts are instituted for the purpose of deciding disputes between litigants. To do this they must determine the truth of such material questions of fact as are in controversy. In the performance of this duty, certain rules of evidence were established as being the best, that, without infringing on public policy, could be devised for the ascertainment of truth. It was, however, considered that individual should yield to public benefit. Therefore no rules of evidence, contrary to the interests of the public at large, could be adopted, although beneficial to individual litigants.

Among the rules thus established, were those that exclude a party from being a witness in his own favor, and also a person pecuniarily interested in the result of a litigation, from being a witness on behalf of the side on which he was so interested.

Two reasons were assigned for these rules; the one, danger of prejudice to the opposite party, by the introduction of false testimony by witnesses biased by such interest; the other,

danger to public morals, by offering an inducement to perjury, and falsification of books and papers. Both these reasons spring from the interest of the party or witness who is offered as a witness.

There was a further rule which ~~forbid~~ forbade a party to an action from being examined as a witness at the instance and in behalf of his adversary; and, as an incident of this further rule, a party was not allowed to obtain either an inspection before trial, or the production at the trial, of the books, papers or documents of his adversary.

This last rule is sometimes said to be founded on a general principle of law, that no man shall be compelled to give evidence against himself; but this principle is itself deduced from the same doctrine upon which the first two rules rest, since it is evident that bias and temptation to commit perjury and falsify is as strong to one who is compelled to give evidence against himself, as it is to one who voluntarily testifies in his own favor.

These rules were as ancient, as well settled and as firmly established as any of the principles of the common law.

But in course of time, the last of these rules was found to be such a drag on the ascertainment of truth in judicial investigations, as in civil actions, to overbalance the objection to such compulsory examination and production, arising from apprehended danger to the public morals, and it was considered, that so far as prejudice to the party desiring the examination of his adversary was involved, it was matters for his own consideration, and if he chose to subject himself to that prejudice it was not for the court to interfere.

The country was ripe for a change.

The judges of the court of common law, however, deriving their power from, and proceeding according to the course and principles of the common law, found themselves constrained to hold that they had no power or authority to set at naught, out of their own heads, by judicial decision, the well settled principles of the common law above referred to, and therefore

to hold that they had no power to compel the examination of, or the production of his books, papers and documents by one party at the instance and in behalf of the other.

This want of power became an acknowledged defect in the administration of justice by courts of common law (*Black. Com.*, *vol.* 3, *pp.* 381, 382).

In looking around to find the means to obviate this defect, attention was naturally directed to the court of chancery, which, in the causes whereof it then took cognizance, proceeded, according to the form of the civil law, upon the examination and oath of the parties, and which had withstood an attack made upon it by the commons, for so proceeding against this form, and subversion of the common law (*Black. Com.*, *vol.* 3, *p.* 52). And it was conjectured that that court, which had already interfered to mitigate the severity, or supply the defects in *judgments* at law, on the ground that it was against conscience to allow them to be enforced as originally rendered, would, on the same ground (it not being restrained by the above referred to principles of the common law), compel a party to an action at law to make a discovery of such matters as were necessary to be ascertained, to enable the court of common law to determine the action according to the truth and justice of the case, since to conceal them would be contrary to conscience.

The experiment was tried and was successful.

It thus appears that the necessity of resorting to a court of chancery to obviate the defect in question, instead of having it remedied by the courts of law themselves, arose from the obstacle presented by the above referred to principles of the common law, and from that alone. But for these principles courts of common law, by their usual and ordinary process and proceeding, viz., by subpœna and rules of court, both enforceable by attachment, could have met the requirements of the age and supplied the defect. By subpœna they could have compelled the party to appear before the jury, and there disclose those facts which were locked up in his breast,

and by the same process could have required him to produce on the trial his books, &c., and by rule of court (made upon parties over whose persons they had acquired jurisdiction in an action of the subject-matter of which they had jurisdiction), could compel him, before trial, to submit to an examination and also to produce his books, &c.

If, then, these principles of the common law have been abrogated by statute, courts of common law, by virtue of their pre-existing and still existing common-law powers, have full authority to compel a discovery upon the same principles, and to as full an extent and with as much completeness as the court of chancery was accustomed to do.

Of course, in exercising the authority, courts of common law would look to the former decisions and principles of the court of chancery, and be guided by them, except where they were so manifestly unjust, unreasonable or absurd as to justify their denomination as not law.

This presents two questions:

First. Have the above referred to principles of the common law been abrogated?

Second. Do the principles on which the court of chancery proceeded in compelling a discovery, apply to and warrant the compulsion of a discovery of the nature now asked for?

If both these questions are answered in the affirmative, the power of the court to grant this motion is established.

The legislature of the state of New York has enacted that in civil actions a party to the action may be examined as a witness, either in his own behalf or at the instance and on behalf of the adverse party; and, also, that no witness shall be excluded on account of interest.

These enactments abrogate, so far as civil actions are concerned, the common-law principles that a party to an action, or a person interested in the event, shall not be permitted to give evidence in favor of himself, and that no man shall be compelled to give evidence against himself.

It may be urged that, as the enactment which abrogates

these principles provides for discovery by the oral examination of a party, and by the compulsory production of his books, papers and documents, it excludes all other discovery.

If the principles abolished by a statute are ~~once~~ principles from which a court derives authority to exercise certain functions, it would necessarily follow that the abolition of those principles abolished the authority, and then the only authority to act would be such as the statute gave.

But when the principles thus abolished had theretofore simply operated in restraint of the ordinary powers and procedure of a court, which is the case here as above reasoned, then abolition simply removes such restraint and leaves the court to unfettered action, except in so far as it is curbed by provisions of the statute.

Thus, then, so far as a discovery by oral examination and production of books, papers and documents are concerned, the provisions of the statute are to be followed. But there is no prohibition against the compelling of any other discovery which may be conformable to the principle of the former practice of the court of chancery.

True, the court of chancery has been abolished, and it is enacted that no bill to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed; but the principles of equity jurisprudence are still in force.

Courts of equity, in compelling discovery, proceeded on the principle that it was against conscience that a party to a litigation having knowledge, or the means by which knowledge could be obtained, of facts material to the litigation, should obtain an advantage to himself to the sacrifice of the development of truth, and consequent working of injustice by withholding and concealing such knowledge and means.

Upon this principle a discovery of books, papers and documents is ordered.

The principle clearly covers and authorizes the compulsory discovery, in a proper case, of things or substances other than books, papers, &c.

It can readily be perceived that, although the cases would be rare where the discovery of any thing or substance other than books, &c., would be required or proper to be ordered, yet cases sometimes do occur, and this is one, where such discovery is both requisite and proper.

I am aware there is no recorded case of an application for any such discovery having been granted; but, at the same time, there is no recorded case of any such application having been denied. It is probable no such application was ever made. The reason why it never was cannot be known, but many may be conjectured. Among them, that people are always timorous of taking the initiative, especially if the step is likely to subject them to large expense, as a suit in chancery would; therefore, a case of urgent, almost absolute, necessity is requisite to set them in motion. It is probable that no case of sufficient urgency to overcome this timorousness occurred. Again, at the time of the commencement of the action at law, the subject of which inspection is desired may either have been lost, destroyed, used up, or passed out of the control of the party, or have become so changed by natural or artificial causes, as that an inspection would be of no benefit. Again, as a suit in chancery was of considerable duration, the subject would, in all probability, have become so changed from natural causes that an inspection, when ordered, would be of no avail. Again, in a large proportion of cases it may have been considered that the benefit to be derived would not be adequate to the expense.

A motion similar to the present obviates all these objections, except the second; for the principle being now established it will require but a few days to adjudicate on any particular motion, and the expense is but trifling.

Nor have I overlooked the fact that the court of chancery established many rules for its guidance in granting and refusing a discovery asked for; but none of these rules are antagonistic to granting this motion.

The fact that the discovery asked is of a portion of the

body at first disposes the mind to regard it unfavorably, on the ground of delicacy. But it is not the first case in which such an examination has been had, as witness: *Cases of Mayhem* (*Black. Coms., vol.* 3, *p.* 333); *Cases of Divorce for Impotency* (5 *Paige*, 554; *Beck's Med. Juris., vol.* 1, *pp.* 116 -125); *Cases of Alleged Pregnancy* (*Beck's Med. Juris., pp.* 204, 205).

Upon an examination conducted under the authority of the court there can be no undue exposure.

I conclude that the court has the power on this application to order an examination, and that this is a proper case in which to exercise it.

Motion granted.

NOTE. — The above opinion, though rendered some time since, having come to us with an urgent request by several prominent members of the bar that we should publish the same, and after a careful examination of the points decided, we can only say that we deem it of sufficient importance to give it place. The cases are quite scarce upon the question. We find only: *Andrews' Trials* (*p.* 41); *People* agt. *McCoy* (45 *How.*, 216); *Cone* agt. *Twitchell* (1 *Brews.* [*Penn.*], 561); *State* agt. *Garrett* (71 *N. C.*, 85); *State* agt. *Jacobs* (5 *Jones* [*N. C.*], 259). These are all criminal cases, and are quite conflicting. We only wonder that the opinion upon the point in this case has never found its way into the reports before, as, so far as we can discover, it is *sui generis*. — [REP.

Comm.

SUPREME COURT.

THE PEOPLE *ex rel.* THE GAS-LIGHT COMPANY OF THE CITY OF SYRACUSE agt. THE COMMON COUNCIL OF THE CITY OF SYRACUSE.

Mandamus — what delay is fatal to the writ.

Where parties have acquiesced for nearly two years in the proceedings sought to be set aside, a *mandamus* will not be granted.

The writ is allowable in the discretion of the court. The delay for so long a time is fatal to the relief sought.

Onondaga Special Term, January 28, 1876.

THIS was an application for a peremptory mandamus to compel the respondents to complete proceedings begun to acquire the lands of the relator for widening a street. The relator was awarded $5,600 by three commissioners appointed by the county court of Onondaga county. The report of said commissioners was made and presented to the common council, and ordered filed on the 11th day of December, 1871. According to the charter of the city of Syracuse, it then became the duty of the common council to pass resolutions directing the completion of the proceedings. Nothing further was done in the matter until the 13th day of October, 1873, when the common council adopted a resolution rescinding its former action, and declaring all proceedings taken pursuant thereto abandoned and discontinued. No proceedings were instituted or attempted by the relator in respect thereto until the 29th of June, 1875, when an alternative writ of mandamus was allowed, to compel the common council to go on and complete the proceedings to acquire the title to the lands of the relator.

The common council filed their return, and a motion was then made by the relator for a peremptory writ.

George F. Comstock, for relator.

Irving G. Vann, for respondents.

HARDIN, *J.* — If this application had been made promptly after the report of the commissioners, or after the resolution of the common council in 1873 abandoning the proceedings, the relator, under the decisions made by the court in this district (*reported in* 20 *Howard*, 491; MORGAN, *J. delivering the opinion*), would have been entitled to the allowance of the writ asked for.

That case arose under the charter of the city of Syracuse, and seems to be in point and favorable to the relator.

The principles of the case were examined by the court of appeals, in a case reported in 56 *N. Y.*, 144, and conclusions were reached by the court of appeals that seem to weaken the case in 25 *Howard* as an authority.

In the Matter of Syracuse, Binghamton and N. Y. R. Co. agt. *Smith*, it was held by HARDIN, *J.*, that until the formal report is made, filed and confirmed, the proceedings in railroad cases to acquire lands may be discontinued. That result was sustained by the general term in this department (*See also Hudson R. R. R. Co.* agt. *Unswater, &c.*, 3 *Sand*, 690).

This writ is allowable in the discretion of the court.

The application for it was not made until more than twenty months after the resolution of the common council abandoning the proceedings.

The delay is fatal to the relator (*People* agt. *Seneca Common Pleas*, 2 *Wend.*, 264).

In that case the delay was one year, and the writ was refused (*See also* 2 *Johns. cases*, 217; 16 *Johns.*, 59; 10 *Wend.*, 285; 2 *Crary, Sp. Pro.*, 62).

The writ must be refused, and the motion is therefore denied with costs.

SUPREME COURT.

JAMES N. WATSON agt. THE HARLEM AND NEW YORK NAVIGATION COMPANY AND THE MORRISANIA STEAMBOAT COMPANY.

Injunction to restrain the combination or consolidation of two rival steamboat companies — parties.

The defendants are rival steamboat companies organized under the act of 1854 (*Laws of* 1854, *p.* 518, *chap.* 232), and have been competing for the transportation of passengers and for public traffic for some years, the rivalry and competition between them being severe and keen. The tendency of this competition would naturally be for the benefit of the traveling public in reducing the rates of fares and freights. Suddenly these competitors come together and make an agreement for the purpose of running the boats of their respective lines for *joint* or *mutual benefit* or *account*, thus making a complete union of the interests of the two companies; at all events, providing for a joining of the companies for the protection of certain supposed *mutual interests*. *Held*, that such *combination* is in conflict with the provisions of section 22 of the act entitled "An act for the incorporation of companies formed to navigate the lakes and rivers," passed April 15, 1854, which provides that "No such company shall *combine* with any other company formed under this act for *any purpose*."

Held, also, that the creation or formation of such monopolies is contrary to public policy and injurious to the public, and is the very thing the legislature designed by the provision of the statute to prevent.

The plaintiff, who is a stockholder in one of the corporations, sues on behalf of himself and of such other stockholders as shall elect to join in the action, joining both corporations as defendants *Held*, that the action is properly brought.

Special Term, January, 1877.

THIS action was brought by the plaintiff, a stockholder in The Harlem and New York Navigation Company, to cancel

and annul a certain agreement entered into between the defendants, for the purpose of running the boats of their respective lines, for joint or mutual benefit and account, and to prevent The Harlem and New York Navigation Company from parting with or surrendering any of its leases and franchises as provided in said agreement. The complaint alleged the solvency of The Harlem and New York Navigation Company, and the insolvency of The Morrisania Steamboat Company; the greater value of the landings and franchises of the former company as compared with those of the latter; that the agreement entered into was in conflict with an express statute of this State, and that the execution of said agreement was in violation of the by-laws of The Harlem and New York Navigation Company. A preliminary injunction was granted restraining the defendants from doing any matter, act or thing in relation to, or under said agreement, and on the hearing of the application to continue the injunction, Mr. Justice LAWRENCE delivered the following opinion, granting the application.

Charles W. Dayton, attorney, and *Albert Cardozo*, of counsel for plaintiff.

Anderson & Young, attorneys for defendant The Harlem and New York Navigation Company.

Thomas L. Ogden, attorney, and *Samuel E. Lyon*, of counsel for defendant The Morrisania Steamboat Company.

LAWRENCE, *J.* — The twenty-second section of the act entitled "An act for the incorporation of companies formed to navigate the lakes and rivers," passed April 15, 1854, provides that "no such company shall *combine* with any other company formed under this act *for any purpose*, or shall purchase, own or hold, or be interested in any stock or property of any other such company, unless the same shall have been

bona fide pledged, hypothecated, or transferred to such company by way of security for or in satisfaction or part satisfaction of a debt or debts previously contracted in the course of the transaction of the business of such company."

It is alleged by the plaintiff, who is a stockholder in the Harlem and New York Navigation Company, that the provisions of this section will be violated, if that company and the other defendant, The Morrisania Steamboat Company, are permitted to put into execution the contract or agreement made between the two companies, and bearing date the 6th day of October, 1876. That agreement provides in the first place, that the contracting parties mutually agree and covenant to operate their respective steamboat lines for their joint benefit.

For the accomplishment of this purpose, it is agreed that there shall be run and operated upon time tables, to be agreed upon during certain specified periods, a certain number of steamboats, unless otherwise *mutually* agreed upon; that there shall be a freight tariff adopted, *which shall be strictly adhered to* by both companies; that there shall be placed at each wharf or landing used by the parties, gates and gate keepers, *who shall receive the fares of passengers traveling by the companies' boats*, the expense of which shall be *equally borne;* that the receipts of the boats shall be paid by the collector of each boat to the secretary of his company at the end of each round trip, and that the gate-keepers at the end of each day shall send their receipts to the agent of the two companies, &c.; that the secretaries of each company shall pay over to the agent the receipts of their respective collectors on the following morning; that the agent shall make an equal division of the receipts between the two companies daily; an agent is named in the agreement, and provision is made for the appointment of his successor in case of his resignation or removal. The agreement further specified the places at which the landings of the boats shall be made.

These landings are to be jointly used and the expenses

attending them are to be *equally* borne. It is further agreed that all rents paid and moneys received of and from all docks from and after the date of the agreement which are now used by either of the parties, but which may not be used by said companies after this agreement is carried into effect, shall be equally paid and divided by and between the two companies, &c. Also, that the tickets of both companies shall be redeemed by either at the rate at which they were sold, and each party shall forthwith report to the other the number and amount of the tickets outstanding at the date of the agreement, and that hereafter the rates of fare shall be uniform and shall be jointly agreed upon. It is also agreed that the agreement shall continue in full force until one year after notice of proposed cancellation shall have been given by one of the parties to the other, or until it shall have been canceled by mutual consent, each company is also to furnish to the other a bond, in the sum of $5,000, with sufficient sureties, &c., for the faithful carrying out of the agreement.

A committee of three directors from each company is to be appointed, who shall constitute a "joint committee" and to whom shall be referred all matters of difference, pertaining to the general management of the two companies under this agreement. There is then a general provision that neither company is to have any management or control over the boats of the other company other than the direction, as therein agreed, of the time of running, of the places of landing, the rates of fare and freight and the disposition of the moneys received for freight and fare and that neither company shall be liable for debts contracted by the other, nor for wages, repairs, fuel, &c., that may be supplied, nor for damages incurred by the other by any collision or other accident, &c.

There is a further provision, to the effect, that if either of the parties shall fail to carry out the terms of the agreement, the other may at its option cancel the agreement, but the

fact of the failure of either company to keep the agreement shall be decided by a majority of the "joint committee."

I have recited the provisions of the agreement with so much particularity, in order that it might be clearly understood just what the arrangement was into which the two companies have entered and which the plaintiff seeks to enjoin, on the ground that the same is in conflict with the section of the act of 1854, quoted in full at the commencement of this opinion. It must be quite apparent to any one, after perusing the agreement, that whether there would be a combination of the two companies or not within the meaning of the statute, if the agreement should be carried into effect, there would be at the very least a complete union of the interests of the two companies. Neither could be interested in excelling the other, either in regard to accommodating the public with boats calculated to promote the comfort of their passengers or in the regularity or speed of their trips. If the agreement does not constitute a partnership between the two companies (which is a question not now necessary to be decided), it creates something which bears a strong resemblance to a partnership. At all events the agreement provides for a joining of the companies for the protection of certain supposed mutual interests and the disposition of this motion depends entirely upon the interpretation which is to be given to the word "combine" as employed in the statute.

The learned counsel for the defendants contend that the word "combine, as thus used, is only to be understood in what they designate as its bad sense, *i. e.*, to prevent that which is contrary to public policy, or injurious to the public, and that what is sought to be prevented by the act is a consolidation of the companies, or a combination, confederation or conspiracy. The word "combine" is not to be found in either of the dictionaries of Burrill or Bouvier, and I do not find it defined in the edition of Jacobs to which I have had access. Bouvier defines combination as a union of men for the purpose of violating the law, and as a union of different

elements. Jacobs, without specifically defining the word, states that "combinations to do unlawful acts are punishable before the unlawful act is executed; this is to prevent the consequences of combinations and conspiracies," and he refers to the titles "confederacy and conspiracy." He defines confederacy to be "where two or more combine together to do any damage or injury to another, or to do any unlawful act." As to the meaning of the word "conspiracy," he says this word was formerly used almost exclusively "for an agreement of two or more persons falsely to indict one, or to procure him to be indicted of felony, now it is no less commonly used for the unlawful combination of workmen to raise their wages, or to refuse working except on stipulated conditions." Worcester defines "combine" thus: "to join together;" "to coalesce;" "to unite;" "to be united;" "to be joined in friendship or in design." And he defines "combination" to be a "union of persons for certain purposes;" "association," "alliance," "coalition," "confederacy." And Roget, in his *Thesaurus*, classifies the word "combine" as synonymous with or belonging to the same class as "unite, incorporate, *amalgamate*, imbody, absorb, reimbody, blend, merge, fuse, melt into one, consolidate, *coalesce*, *centralize*, to impregnate, to put *together*, *to lump together*." It is a familiar rule in the construction of statutes that the words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and proper use, and that courts should not resort to subtle and forced construction for the purpose of either limiting or extending their operation (*Dwarris on Statutes by Potter*, *p.* 193; *McClusky* agt. *Cromwell*, 11 *N. Y.*, 601, 602, *and cases cited*).

Keeping this principle in view, I think that there can be no difficulty in determining precisely what the legislature intended in using the word "combine" in the twenty-second section of the act now under consideration. They did not intend to use, and did not use, that word in the strict technical legal sense which is maintained by the counsel for the

defendants. The object of the legislature was to prevent coalitions, unions, mutual agreements, blendings of the companies which might be organized and incorporated, under the act, for any purpose. Whether this was a provision which was wise or unwise, it is not for me to determine. As I view it, the legislature did not intend to prevent the combination of these companies *solely* as respects the commission of unlawful acts, but also as respects the arrangement of freight and passenger rates, and the numerous other matters which are specified in the agreement. I have said that with the propriety of this provision it is not within the province of this court to deal; and yet it may be said, while on this point, that many considerations suggest themselves which go to show the propriety and necessity of such a provision. The plain object of the legislature was to prevent the creation or formation of monopolies by the union or combination of these companies. It can readily be seen that such a result might, and indeed almost necessarily would, result from such a combination.

This very case presents an illustration of this point. Here are two companies which have been competing for the transportation of passengers and for public traffic; the rivalry and competition between them has been, according to the affidavits, most severe and keen.

The tendency of this competition, naturally, would be for the benefit of the traveling public, in reducing the rates for fares and freights. Suddenly these competitors come together and make the agreement, which is the subject of consideration, for their "*joint benefit*," not for the benefit of the public.

Assuming, however, that the word "combine" is to receive the limited construction which is contended for by the defendant's counsel, and that it is to be taken in its bad sense, as intended to prevent something which is contrary to public policy or injurious to the public, it seems to me that the defendants must fail. If the legislature designed by the pro-

vision to prevent the formation or creation of monopolies, as I have endeavored to show, the creation or formation of such a monopoly is contrary to public policy and injurious to the public. On the argument, some affidavits were presented which were designed to prove that in point of fact the agreement referred to, if carried into execution, would redound to the benefit of the public by preventing racing and the dangers attendant thereon, and also by securing uniformity and regularity in the trips of the boats. To these affidavits the plaintiff's counsel claimed the right to reply in case the court deemed them of importance in the disposition of the case. Such leave would be given if I deemed those affidavits as having any weight in the determination of this controversy, but I do not. If the view expressed by me is correct the statute has made the act, which the defendants propose to perform and carry out, unlawful; and, however meritorious or advantageous it may be *per se*, the court has no alternative but to enforce the provisions of the statute.

The remaining question is as to the right of the plaintiff to maintain this action. As the plaintiff sues on behalf of himself and of such other of the stockholders as shall elect to join in the action, and as both of the corporations are before the court, it would appear that the action is properly brought (*Greaves* agt. *Gouge*, 49 *How. Pr.*, 79; *Gray* agt. *N. Y. and N. J. S. Co.*, 3 *Hun*, 383).

The motion to continue the injunction is granted, with costs of motion.

N. Y. COMMON PLEAS.

JOSE A. OBREGON and another agt. JUAN C. DE MIER.

Arrest — Money received in a fiduciary capacity.

Where a *specific sum of money* is intrusted to a party upon the credit of his personal integrity to be invested in a *particular way*, it cannot be charged to his mercantile credit, which is based upon his financial status only, and be thereby reduced or changed to a simple debt.

Such money is held by him in a *fiduciary capacity* and must be used as directed by the owner of the fund; and the relation is not changed, though the previous directions are rescinded and a new direction is conveyed in the form of a draft upon him for the whole sum.

Although, by the acceptance of the draft the defendant incurred a liability to the payees and holders of the draft, it is sufficient upon the trial to surrender any such securities.

Special Term, November, 1876.

THE plaintiffs are merchants at Bogota and the defendant is a merchant at New York. Prior to March, 1875, the plaintiffs and defendant had various dealings with each other, and there was at that time an open account between them. On the 17th of March, 1875, the plaintiffs sent to the defendant a draft at ninety days for $12,000, with instructions to expend the same in the purchase of silver to be shipped to them. In consequence of some uncertainty as to the kind of silver to be purchased and shipped, the defendant did not fill the order, but wrote for further instructions on the twenty-third of April. On the 26th of May, 1875, the plaintiff's reply, countermanding their order for the purchase of silver and directing the defendant when he shall have received the money upon the draft to pay Messrs. De Castro & Co. any balance which the plaintiffs might owe them, and

to pay himself what the plaintiffs owed him and to forward the balance to M. Vengohecha & Co. of Paris. On the 7th day of June, 1875, the plaintiffs informed the defendant that they had thought it best to draw on him in favor of M. Vengohecha & Co., of Paris, for the $12,000 at sixty days. The draft, when presented, the defendant accepted, but did not pay the same at maturity. Thereupon the plaintiffs commenced this action to recover the $12,000 in question, claiming that he received the same in a fiduciary capacity, and an order of arrest was issued herein against the defendant who was arrested and held to bail thereunder.

Mr. Fuller, for motion.

Mr. Hatch, opposed.

VAN BRUNT, *J.* — It might be sufficient to dispose of this motion, to observe that the cause of action and the ground of arrest being identical, the court will not try the issue upon affidavits. Unless the plaintiffs can show that the defendant is indebted to them for money received in a fiduciary capacity they must necessarily fail in this action, because there can be no dispute as to the facts. It is perhaps as well that the motion should be disposed of upon its merits.

The objections made by the defendant to the order are two: First. That the money was not received in a fiduciary capacity. Second. Even if it was, that relation was changed by the drawing and acceptance of the draft for the money so received.

I am unable to come to any other conclusion than that the money was received in a fiduciary capacity. It was a specific sum which was to be invested in a particular way. The instructions were specific upon that point, and the defendant so understood them. This money was to be invested in silver and nothing else, and this silver shipped to the plaintiffs. The defendant had no right to use any portion of the money

for any purpose except the purchase of the silver, and plaintiffs did not repose any trust in the pecuniary responsibility of the defendant, but they did repose confidence in his personal integrity. They did trust him to invest their money in silver. Could it be for a moment claimed that any creditor of the defendant could have reached this money in the hands of the defendant? Would the court have hesitated a moment in saying that this money did not belong to the defendant, but was plaintiffs' property? I think it is clear, therefore, that this money was received in a fiduciary capacity. This brings us to the second objection.

It will be observed that upon the plaintiffs being advised that the defendant had not complied with their instructions, they at once informed him not to purchase the silver, but out of their money pay De Castro & Co. any sum which they might owe them, and to pay himself any balance due him and remit the balance which might remain.

In passing it might be well to observe, that if this money was simply to be passed to the credit of the plaintiffs upon the books of the defendant, it is exceedingly strange that the plaintiffs should have given the defendant express authority to pay himself out of this money when the mere crediting it to the plaintiffs upon the defendant's books would have accomplished this result. Here, then, we have their specific directions for disposing of this money. Before, however, the defendant had complied with these directions the plaintiffs informed the defendant that they had drawn upon him for the whole amount in favor of the firm in Paris, and the defendant accepts the draft which, however, he does not pay at maturity. This necessarily rescinds the previous directions as to the disposition of the money.

I am entirely unable to see that the drawing of their draft places the matter in any different light than the directions contained in the previous letter. It was no more than a direction to pay the whole of the money to the payees named in the draft or their order.

It was a draft drawn against a particular fund in the hands of the person upon whom the draft was drawn belonging to the drawer, and I am entirely unable to see how it can possibly change the relation of the defendant to the fund. Upon his failure to pay the draft the defendant stood in the same relation to the plaintiffs as though he disobeyed instructions contained in a letter disposing of the fund. It is true that by the acceptance of the draft the defendant incurred a liability to the payees and holders of the draft, and that plaintiffs are bound to return to him this draft. But the rule is well settled that it is sufficient upon the trial to surrender any such securities.

Under the circumstances of this case I am unable to regard this draft in any light except as an order to pay this money to the payees therein named, or their order, and upon failure so to do the defendant became liable to the plaintiffs for moneys received in a fiduciary capacity.

Motion to discharge order of arrest must be denied, with ten dollars costs to abide event.

SUPREME COURT.

ROSE LEVY et al. agt. JANE ANN MERRILL.

Mortgage — presumption of payment — action to cancel.

Where a bond and mortgage, given by a father, were found by his children at his death, amongst his papers, the same having been in the father's possession for many years, and no claim having been made for either principal or interest for a period of ten years, the presumption is, that the mortgagor and his children were lawfully in possession of the bond and mortgage, and that the same are paid.

An action may be maintained to have a bond and mortgage declared to be of no validity, although the land upon which the mortgage is claimed to be a lien, has been sold by the heirs of the mortgagor, when a part of the consideration money, equal to the amount of the mortgage, has been retained and deposited in a trust company, to abide the event of an action to determine the validity of the bond and mortgage.

Townsend agt. *Goelet* (11 *Abb. Pr.*, 187) distinguished.

Special Term, October, 1876.

Andrew Blake, for plaintiff.

T. C. Campbell, for defendant.

VAN VORST, *J.* — The bond, the payment of which is secured by a mortgage, is dated the 15th day of November, 1864. By the condition written in the bond, $1,000 was to be paid upon the 1st day of May, 1865, and the further sum of $1,000 on the 1st day of August, in the same year. The bond bears a receipt, dated the 11th day of January, 1865, acknowledging a payment thereon of $1,000, signed by the husband of the mortgagee, who it appears was her agent in

the matter. There is no evidence written on the bond of any further payment, nor is any receipt produced of any such payment. But the fact that the plaintiffs are in possession of the bond and mortgage, and now bring the same into court as their property, is presumptive evidence that they are so legally and properly. This presumption is greatly strengthened by the fact, that the bond and mortgage were in the possession of their father, one of the mortgagees, for many years and up to the time of his death; that it was found among his papers by the plaintiffs, after his decease, and that they, his children, have held it up to the present time. Further force is given to this presumption by the additional fact that the mortgage was due more than ten years ago, and no interest has been paid in the mean time, and no proceedings have been taken by the mortgagee, for the foreclosure of the mortgage, nor any step hostile to the plaintiffs' claim that the mortgage is fully paid (2 *Greenlf. on Ev.*, §§ 527, 528). The mortgagors are dead and their lips are closed, but the children testify that since their parents' death no demand has been made upon them for interest.

The above facts raise a reasonable presumption that the bond and m rtgage are paid, and unexplained justify the position taken by the children, that the mortgage should be satisfied of record. A witness is also produced by the plaintiffs, who testifies that in April, 1865, he went with Morris Hartz, one of the mortgagors, to the store of the husband of the mortgagee, and that then and there the mortgagor paid the husband of the mortgagee a sum of money, and received from him a bond and mortgage; that the payment made was spoken of as a last payment, and that Morris Hartz said, "I want my mortgage paper," and the same was delivered to him.

To meet this case, the husband of the mortgagee swears, that but one payment has in fact been made upon the mortgage, viz., that of January, 1865. That at the time said payment was made, he not only receipted the same on the bond,

but gave Morris Hartz a duplicate receipt. That Hartz, after making the payment, asked the husband of the mortgagee to let him take the bond and mortgage, as he desired to show some person named by him that a payment had been made thereon. That he acceded to such request and delivered the bond and mortgage for such purpose. That Morris Hartz not returning the mortgage and bond the next day, or the day after, he called upon him and demanded the papers, which were refused, and that the same have been since withheld from him. The testimony of the husband of the mortgagee is, to some extent, corroborated by the testimony of a witness who claims to have been present. But it is not an entire corroboration of all the evidence of the husband of the mortgagee on this subject. This witness, however, locates the time of payment of money in January, and that the papers were then handed to Morris Hartz.

There are circumstances which greatly weaken the position of the husband of the mortgagee and herself, with respect to this claim, that the mortgage is unpaid, and these may be stated shortly as follows: Before this suit was commenced, the plaintiffs, with a notary public, called upon the mortgagee and demanded a satisfaction of the mortgage. She declined in the absence of her husband to execute the same; but then made no claim that the mortgage was unpaid; contrarywise said, she supposed it was settled, but referred the parties to her husband. I think if the mortgage had been taken from her husband in the manner he now claims it was, and the same was in fact unpaid, that she would probably have been advised of the fact, and would have had some information upon a subject in which she had a direct pecuniary interest; and especially so, when so much time had elapsed since the mortgage by its terms became due and payable. When called upon for a satisfaction, the husband of the mortgagee did say that the mortgage was unpaid. But he made no claim that the mortgage had been delivered by him to one of the mortgagors, under the circumstances stated

by him on the trial. I am of opinion that he would naturally have made such claim, if true, when the mortgage was so presented by the notary public for satisfaction. I think if his claim was true, he would promptly, at that time, under the impulse of the occasion, have avowed the wrong which had been done him; but he was silent on that subject, claiming only that the mortgage was unpaid. The notary public denies, however, that the husband of the mortgagee claimed there was any thing due upon the mortgage.

The notary testifies that he supposed there was a receipt for the remaining $1,000, and so stated to the husband of the mortgagee, and that he also told him that he should know whether it had been paid; and that the husband of the mortgagee said if a receipt was produced, he would satisfy the mortgage. Now in such a discussion, at that time, it would seem that the husband of the mortgagee would, if the fact was truly so, have made a claim that he had been, in fact, defrauded out of the possession of the mortgage. It was useless to say if a receipt was produced he would satisfy it, when he well knew no such receipt was in existence.

The delay of the mortgagee in making any claim, and only interposing same when affirmative action was taken by the heirs of the mortgagors, for the satisfaction of the mortgage, is unfavorable to the claim of its non-payment. It is true that the husband of the mortgagee says, that when he failed on request to obtain a restoration of the mortgage, he consulted a lawyer, who is now dead, and that this lawyer advised him that no steps were necessary, as the mortgagor could do nothing with the mortgage, and that the matter would come out by and by.

This statement is not an entirely satisfactory explanation of an omission, to take action in the premises, for a period of over *ten years*. It is also unfavorable to the position of the mortgagee, that this distinct claim was not interposed in an effective way in the life time of Morris Hartz, who was the person best qualified to make any contradiction of the

claim, that the mortgage is not in part paid, and who could alone have explained the manner in which, and the time when, he obtained possession thereof.

Upon a review of the whole evidence, and upon the most careful consideration, I am compelled to the conclusion that the mortgage is paid. This result is only reached by a rejection of the defendant's claim, and the evidence by which it is attempted to be supported. It is a painful duty in this way to set aside the evidence adduced in support of the defendant's position; but I am of opinion that all the presumptions and suggestions of what is both probable and reasonable, under the circumstances of this case, unerringly lead to the conclusion, that the mortgage is paid and should be satisfied. Why should the husband of the mortgagee place in the hands of the mortgagor, the debtor of his wife, with permission to take away the only evidence of the debt, for the purpose of showing a stranger that a payment had been made upon it, when he held in his hand a receipt acknowledging that payment? Why should he give the mortgage, as well as the bond, when it was the latter paper only which bore the evidence of payment? And when, after the lapse of years, the party to whom the papers were delivered being dead, and his children asking for a satisfaction, should he refrain from promptly asserting what he claimed to be facts, which would explain the manner in which the mortgage had come to their father's possession, as a reason for his refusal to satisfy same, and aver his readiness to execute a satisfaction, if a receipt was produced when he knew no receipt had been given?

These questions naturally arise from a consideration of the case, and no satisfactory answer can be found in the evidence or in reason. The remaining question is, can this action to compel a satisfaction be maintained? The heirs have conveyed the lands covered by the mortgage to a third party, but the purchaser has withheld an amount of the purchase-money sufficient to pay the amount claimed to be unpaid

upon the mortgage, and the same is deposited in the trust company to abide the event of a proceeding to procure a satisfaction of the mortgage, and to pay whatever may be found due thereon. So long as the mortgage remains unsatisfied of record, the plaintiff cannot realize the full consideration for the sale and conveyance of the premises.

The rule is, without doubt, that a person who has no longer any interest in the land, cannot maintain an action to remove an apparent lien upon the land, on the ground that it is a cloud upon the title. I am referred, by the counsel for the plaintiff, to the case of *Townsend* v. *Goelett* (11 *Abb Pr. R.*, 187), as decisive against the plaintiffs' right to maintain this action. That case is clearly distinguishable from the present. It was there held that a grantor who has no longer any interest in the land, cannot maintain an action to remove an apparent lien thereon, on the ground *that he agreed with his grantor* that he would procure *the lien to be discharged.* The incumbrance sought to be removed was a judgment, not against the plaintiff, but against a third person. The plaintiff was in no way privy, party to, or connected with the judgment, nor as between him and the judgment creditor was he bound to pay it. Not holding a title to the land, the plaintiff had agreed to procure the land to be discharged from the lien. Such agreement did not authorize him to maintain an action against the judgment creditor for the removal of the lien.

In this case there is privity between the plaintiff and the mortgagee. *Runill* agt. *Keller* (60 *Barb., p.* 617), to which I am also referred, decides only that a party cannot maintain an action to remove a cloud from the title to land in which he has no interest, upon the *sole ground* that *he has warranted the title.* That is not this case. But this last case suggests that if the action was for relief against a bond, accompanying a mortgage, claimed to be cloud upon the title, and by which he was endangered, he might, upon sufficient allegations, be entitled to relief through "*quia timet.*"

This suit is in effect to have the bond, as well as the mortgage canceled, and declared to be of no further validity, on the ground that the bond is in fact paid, and that their existence, and the record of the mortgage, prevent the plaintiffs from realizing the proceeds arising on the sale of the land.

The money part of the consideration arising from the sale in the trust company, represent *pro tanto* the land, and by the claim under the bond and mortgage, and its outstanding record, is locked up. Plaintiffs, as long as this claim and record are made and unsatisfied, cannot reach this money. I cannot see but that the plaintiffs are practically without remedy in the premises, unless this action be maintainable. The mortgagee has for ten years refrained from taking any proceedings to enforce it, and upon application has refused to execute a satisfaction.

If the defendant has, in truth, any claim under the mortgage, she can assert it here as she has done under her answer.

I can conceive no better way in which the matter may be determined than in this action. The other cases and authorities to which I have been referred I do not regard as against the plaintiffs' right to sustain this action. The bond being in fact paid, as is above decided, the plaintiffs are entitled to judgment, that the defendant upon presentation execute a satisfaction of the mortgage, and that the bond be adjudged to be satisfied and paid, and the record of the mortgage be effectually discharged.

That the plaintiffs recover their costs of this action.

N. Y. SURROGATE'S COURT.

In the Matter of the Estate of Edward Lynch.

Will — legacy — when interest begins to run.

Where a sum is left in trust, with direction that the interest and income be applied to the use of a person, such person is entitled to interest from the death of the testator (*Following Cook* agt. *Meeker*, 36 *N. Y.*, 15).

The authorities on this subject collected in the opinion and carefully examined.

This is the petition of Elizabeth A. Lynch, executrix, &c., for leave to resign. The petition sets forth that she and Richard M. Harrison were appointed executors, but that Harrison did not qualify. That on the 4th of March, 1876, she obtained an order to advertise for claims, and did so; has paid all the debts presented, except eighty dollars, and she believes that there are no other debts unpaid; that she has paid all legacies, excepting $1,500, which she is directed by the will to hold in trust, and pay the income to Mrs. Ann Mahoney during her life, and upon her decease to pay said sum to her issue; that petitioner is the residuary legatee under the will, and believes she is entitled to the remaining assets of the estate, except the said $1,500 and eighty dollars, and whatever interest said Ann may be adjudged to be entitled to; that she has paid said Ann fifty-two dollars and fifty cents on account of the interest; that she is desirous to be relieved from her trust; and prays that she be allowed to pay the principal into this court for the benefit of said Ann, or that another trustee be appointed.

CALVIN, *S.*—It is consented that the executrix be allowed to resign, and the only question submitted is, when the interest on the sum left for the benefit of Ann Mahoney began to run. The language of the will in that respect is as follows: "I give to the executors of this, my will, the sum of $1,500 in trust, to invest the same and pay the income thereof to my sister Ann, wife of Martin Mahoney, of Saratoga Springs, during her life, and upon her death, to pay said sum to her children surviving her in equal shares." It is conceded that the personal property of the estate was not alone sufficient to pay the debts, but, together with the rent of the real estate, it was sufficient. That there was one parcel of real estate sold January 6, 1877, for $15,500, which sum, after deducting $5,000 of a prior mortgage, paid the legacies, and left but $5,000 to Mrs. Lynch. The legatee claims interest from May 31, 1875, the date of the death of the testator, and admits the receipt of fifty-two dollars and fifty cents on account. The executrix claims that interest runs only from July 20, 1876, a year from the date of granting letters.

Williams on Executors, at page 1221, states the general rule to be, that general legacies in their nature carry interest, and that interest is computed from the time at which the principal is actually due and payable, and that the executor is allowed by law one year from the testator's death to ascertain and settle his affairs, at the end of which time the court, for the sake of greater convenience, presumes the personal estate to have been reduced into possession. Upon that ground interest is payable from that time, unless some other period is fixed by the will; and the learned authority states the exceptions to this rule to be, that if a legacy is decreed to be a satisfaction of a debt, the court always allows interest from the death of the testator. In the case of a legacy given to a child by a parent, or one in *loco parentis*, the court will give interest from the death, to create a provision for its maintenance. That an annuity bestowed by will, without

mention of the time of payment, is considered as commencing from the death of the testator, and the first payment due at the expiration of a year. At page 1226 the same author says: "Again, in some instances, legacies payable at a future period will carry interest, although not given by a parent or a person in *loco parentis*, where there appears an intention on the part of the testator, that the legatees shall be maintained out of the property bequeathed to them."

In the case of *Lawrence* agt. *Embrey* (3 *Bradford*, 364) it was held that annuities are considered as commencing to run at the testator's death, and the first payment is not due until the end of a year.

A bequest of interest, dividends and income of a certain sum to be invested by the executors, does not begin to carry interest until the end of a year, at which time the investment ought to be made, and it is held in that case also that the provisions of the Revised Statutes, as to payment of debts and legacies, have not altered the common law rule, and that the delay of the probate does not deprive the legatees of interest on their legacies, after the expiration of a year from the testator's decease, and that where there is a gift for life of the income of the residue, without any direction to invest, the tenant for life is entitled to the income from the testator's death, on such investments as were then made, or as were subsequently made within a year, together with interest, on the amount not invested, valued as at the time of testator's decease.

But, as is well said by the late surrogate Tucker, in *The Matter of Fish's Estate* (19 *Abb. Pr.*, 209) the learned surrogate, in holding that the Revised Statutes had not changed the rule as to the payment of interest, had doubtless failed to see the then very late case of *Braddon* agt. *Halker* (12 *N. Y.*, 472), where, it seems to me, chief justice GARDINER, in giving the opinion of the court, has rightly held that the statute in question having prescribed the time when legacies are payable, that the interest should be held payable from the time when

the legacies became so payable, for it is the non-payment at the time prescribed which entitles a party to interest upon general legacies, and in the absence of a different provision, it would seem to be obvious that the interest should not be payable until the principal should be legally demanded, and I am therefore of the opinion that the statute in question does change the common-law rule in respect to interest upon general legacies; but the question submitted in this matter is, whether a bequest of interest upon a fund bequeathed in trust to be invested, payable to a person neither an infant nor widow, forms an exception to the general rule above stated, and surrogate BRADFORD, in the case above cited, holds substantially that it does not; but in the case of *Cooke* agt. *Meeker* (36 *N. Y.*, 15), chief justice DAVIES, at page 32, at the bottom, says: "The authorities would seem abundant, therefore, to sustain the doctrine that, when a sum is left in trust with direction that the interest and income should be applied to the use of a person, such person is entitled to the interest thereof from the date of the testator's death," and this authority is cited with approbation, in the case in 19 *Abbott*, above cited, and a careful consideration of the case of *Cooke* agt. *Meeker* will show that there are some material differences between that case and the one under consideration which fully justify the conclusion reached therein, and which did not, therefore, render it necessary that the learned judge, who delivered the opinion, should hold as above quoted. Indeed, that part of the opinion was clearly *obiter;* hence it becomes necessary to consider the cases which he has cited as authority for that conclusion, in order to determine its soundness. Mr. justice BOCKES, in *Cooke* agt. *Meeker* (*at p.* 24, *at the bottom*), in speaking of the facts of that case, says: "The estate was more than sufficient to satisfy all the legacies. It was well invested, on bonds and mortgages drawing interest, at the testator's decease. The executors were authorized to transfer existing securities in satisfaction of the legacies. One of the executors was made the trustee to take and hold the trust fund;

thus no new or especial investment was necessary. The beneficiary was an infant, with no other provision for her support or means of support, so far as the case discloses, and these facts constitute, as it seems to me, a material difference between that case and the present.

On page 19, in *Cooke* agt. *Meeker*, the learned chief justice says, at the bottom: "The weight of authority, undoubtedly, now is in favor of allowing the payment of annuities or income, to commence at the testator's death," to which he cites several authorities, which I deem it my duty to examine with care.

The first cited is *Craig* agt. *Craig* (3 *Barb. Ch.*, 76), which was the case of an annuity, and all the authorities concur that in such a case, where there is no direction as to the time when it shall commence, it commences at testator's death.

The next case cited is *Gibson* agt. *Bott* (7 *Vesey*, 96), the marginal note of which is, that an annuity commences from the death, and the first payment is due at the end of a year; but a legacy does not begin to carry interest till the end of a year unless otherwise directed, which is fully sustained by the text.

The next is *Hearness* agt. *Goren* (9 *Vesey*, 553). In that case the testator bequeathed to his wife the interest of one-half of his property during her life, with liberty to dispose of one-half of said one-half to whom she might think proper. At her decease the other half to devolve upon his daughter.

The testator was a partner in a firm, and the articles of copartnership provided that at the death of either party during the period limited for the partnership — seven years — the business should be carried on to the joint account of the surviving copartners and heirs of the deceased, until June thirtieth, next following, if death happened three months preceding, otherwise to continue till the same date in the subsequent year, when the partnership should determine, and the state of the partnership be made up and divided, and the share belonging to the heirs should be paid one-half at the

end of one year, the other half at the end of two years after such determination.

The lord chancellor, at page 552, says: "It is not very well settled whether a tenant for life is entitled to interest from the death or from a year afterwards;" but in that case he was of opinion that a life tenant ought to have interest, at a given rate, from the death and determination of the partnership, and not the profit, and at the end of the partnership was entitled to interest upon the capital, though dead.

The case of *Augerstein* agt. *Martin* (*Turner & Russell*, 232) was a case where the testator devised lands to John Augerstein for life, remainder to his children. The residue of his personal estate, subject to the payment of debts, was to be laid out in the purchase of lands, to be settled to the same uses, with a proviso that the trust moneys, until so invested, might be invested in government or real securities, and directs the interest to be paid as the rent of the lands when purchased would be payable. A large portion of the testator's personal estate, not required for debts and legacies, was invested upon securities bearing interest. The tenant for life was held entitled to interest of that portion from the death of the testator.

The lord chancellor, at page 240, says: "The testator directs that when the personal estate shall be collected, not that the interest thereafter to arise shall be laid out with the principal, but shall be enjoyed by the person entitled to the rents and profits."

The question then, is, whether, as the testator has given the tenant for life an immediate interest in the real estate, and directs that, if in the course of a year an estate shall be bought, the tenant for life shall be entitled to the rents from the time of the purchase, although a year has not elapsed, and also directed that the personal estate shall be laid out on mortgage or in stocks, there cannot be any inconvenience in saying that the tenant for life is entitled to the interest of the personal estate from the death of the testator; and I think,

with respect to the interest of so much of the personalty bearing interest as is not necessary to be applied for the payment of debts or legacies, the tenant for life is entitled to it from the death of the testator.

In *Hewitt* agt. *Morris* (*id.*, 241) the testator directed his executors to invest the residue of his estate, after paying debts and legacies, in funds or securities, the interest to be paid to the tenant for life, and after his death the principal to be held in trust for his children. It was held that the tenant for life was entitled to interest accruing from a year next after the testator's decease upon funds in which the testator's property stood invested at the time of his death, and which were not required for payment of debts and legacies.

In *Hill* agt. *Hill* (3 *Vesey & Beals*, 183) it was held that a legacy to grandchildren, the object being for provision and maintenance, entitled the legatees to interest from the death.

In *Hilliard's Estate* (5 *Watson & Serjeant's Rep.*, 30) the testator gave and bequeathed unto his executors $1,000 in trust, to place the same out at interest in good securities, and pay and apply the interest and income thereof, as the same should be got in and received, unto his sister during her life, and, immediately after her decease, the principal sum to be equally divided between the children of his late brother.

It appeared that the deceased left investments in bonds, mortgages, &c., bearing interest amounting to over $44,000.

It was held that the sister was entitled to the interest for a year from the death of the testator.

SERGEANT, J., in delivering the opinion of the court, stated the principle to be that, where a sum of money is bequeathed, it does not carry interest with it for a year from the death of the testator, because he is not bound to pay it before the end of a year; and this is the rule, although the personal estate is invested in funds drawing interest; but to that rule there is an exception founded upon the intention of the testator and character and situation of the legatee, and other circumstances; but that, where the bequest is not of the corpus, but of an

income or annuity, there a contrary rule prevails, and the legatee, having an interest for life, is allowed interest from the death of the testator, citing *Eyre* agt. *Golding* (5 *Binn.*, 472); and at the bottom of the page he uses this language: "As between that case and the one before us, I perceive no difference. Interest is, in its nature, an annual profit, and a direction to pay interest makes it payable annually without any thing further." In *Eyre* agt. *Golding* the testator gave unto his daughter Rachel the interest of £400, to be paid her annually during her natural life, and after her decease it was given equally to her children.

Chief justice TILGHMAN, in his opinion, at page 475, says: "Where a legacy is to a child not otherwise provided for, interest is allowed from the testator's death."

It is contended, on the part of the executor, that that exception is confined to infant children, or at most to children who live in the father's family, and have no support independent of the legacy, and cannot be extended to a married woman who is maintained by her husband. * * *

"There is a difference between a legacy of a sum of money to one for a term of life and the bequest of a sum of money to be paid annually for life. In the former case, the legacy not being payable till the end of a year from the death of the testator, of course there is no interest for that year; but in the latter, the first payment of the annuity must be made at the end of the first year, or the intention of the testator is not complied with, and you must count the time immediately from his death, or the legatee will not receive an annuity annually during her life. Suppose she should live eighteen months and then die; according to the construction of the executor, she would not receive one-fourth. How, then, can she be said to receive the interest of $400 annually during her life? * * * A distinction is taken between a general legacy and a bequest of a sum of money to be paid annually; in the latter of which cases the first payment is to be made at the end of the first year from the testator's death, because it commences immediately on the happening of that event." * * *

A careful examination of the treatise upon this subject, together with the decisions both English and American, leaves the question in very serious doubt, and but for the clear language of the learned judge in *Cooke* agt. *Meeker*, above cited, and the two Pennsylvania authorities, I should be inclined to follow the decision by the late surrogate BRADFORD, in *Lawrence* agt. *Embrey*, or when the principle is recognized that an executor has a year in which to make investments, and the will in question directs the investment of the $1,500, and it appears by this case that the estate in question had no securities drawing interest out of which payment could be made for the first year, and no investment having been made nor any suggestion that the executor had been derelict in the performance of his duty in that respect, it seems to me that there is a substantial distinction between an annuity as such and the interest upon a sum to be invested, payable annually in this manner, although it does partake in some sense of the nature of an annuity, but an annuity is chargeable upon the whole body of the estate, while the interest directed to be paid by the will under consideration is only such interest as can be realized from the investment of that sum; and if it should be invested and fail to yield an income, the estate would not be charged with the deficiency.

But I do not feel at liberty to disregard the plain and emphatic language of the learned chief justice in *Cooke* agt. *Meeker*, which may be presumed to have received the attention and scrutiny of the other judges of the court, though it may not have been necessary to the decision of that case; besides, the two Pennsylvania cases above cited seem to be directly upon the point involved in this case; and, therefore, while I am not able to resist the force of the argument to the contrary, above suggested, I feel constrained to respect the above authorities, and to hold that the interest upon the legacy in question began to run from the decease of the testator, and that the executor be directed to pay accordingly.

N. Y. COMMON PLEAS.

TREVOR C. LEUTZ agt. WILLIAM BUTTERFIELD.

Causes that may be removed to the United States courts.

Under the act of congress, passed March 3, 1875, allowing a removal of causes from the state courts to the United States courts in certain cases (*U. S. Stat.*, 1875, *chap.* 137), an action in which there is a controversy between citizens of different states can be removed, even although by reason of plaintiff being an assignee of one who was a citizen of the same state as defendant, original cognizance of the action could not have been taken by the United States court.

General Term, February, 1877.

PLAINTIFF, a citizen of New York, sued defendant, a citizen of Massachusetts, for a balance of account alleged to be due plaintiff's assignor. Defendant entered his appearance in the action, and filed his petition and bond for the removal of the cause to the circuit court of the United States, for the southern district of New York, in pursuance of the statute. The claim in dispute was assigned to plaintiff by one Henry E. Townsend, a citizen of Massachusetts. An application by defendant to this court for an order removing the action to the United States court was denied, and the same was tried by a referee and judgment rendered for plaintiff, from which defendant appeals.

John Henry Hull, for appellant.

Edward D. McCarthy, for respondent.

LARREMORE, *J.* — The proceedings by defendant to remove the action were proved on the trial, and an exception taken to the refusal of the referee to find that this court had no jurisdiction in the premises. The first question for consideration is necessarily that of jurisdiction. Is this court the proper tribunal for the adjudication of the rights of the parties? This depends upon the construction given to the act of congress passed March 3, 1875 (*U. S. Statutes*, 1875, *chap.* 137), entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts and for other purposes." This act repeals all parts of foregoing acts inconsistent with or repugnant thereto, and if defendant has complied with its provisions, then the trial of this action by the referee and all proceedings subsequent thereto were *coram non judice*. By this act (*sec.* 1) the circuit court is given original cognizance of all suits of a civil nature, when the matter in dispute exceeds $500, in which there shall be a controversy between citizens of different states, &c. But said court shall not have cognizance of any suit founded on contract in favor of an assignee, unless such suit might have been prosecuted in said court, if no assignment had been made, except in cases of negotiable paper. Section 2 provides that any suit of a civil nature at law or in equity now pending, or hereafter brought in any state court when the matter in dispute exceeds $500, and in which there shall be a controversy between citizens of different states, may be removed by either party into the circuit court of the United States for the proper district. It is conceded that plaintiff could not have commenced this action in the circuit court, for, as assignee of a claim other than negotiable paper, the limitation of section 1 would apply, and the court could not have cognizance of any such suit. Is this limitation applicable to actions sought to be removed from the state courts? The learned judge who denied the application for removal, held the affirmative of this proposition (*Abbott's New Cases*, *vol.* 1, *page* 18). The intention of the federal

legislature in this respect is not clearly expressed in the act itself. But section 2 gives a defendant the right to remove any suit without distinction as to the character in which the plaintiff sues, except that the parties to the controversy must be citizens of different states. The defendant was entitled as a matter of right to a change of forum (*Stevens* agt. *Phœnix Ins. Co.*, 41 *N. Y.*, 149; *Holden* agt. *Putnam Fire Ins. Co.*, 46 *id.*, 1; *Ayres* agt. *Western R. R. Co.*, 45 *id.*, 260; *Bell* agt. *Dix*, 49 *id.*, 232; *Kanouse* agt. *Martin*, 15 *How.* [*U. S.*], 198; *Gorden* agt. *Longest*, 16 *Peters*, 104), unless such right is controlled by the limitation above referred to, and that question should have been raised and decided in the circuit court (*Bell* agt. *Dix*, *supra*; *Games* agt. *Fuentes*, 92 *U. S.* [2 *Otto.*], 10). It involves the construction of a statute of the United States as to the jurisdiction of a federal court, and should have been referred to that tribunal for adjudication. Defendant's application met all the requirements of the act of March 3, 1875, and a stay was thus imposed upon all further proceedings in this court. The defendant might have availed himself of the authority and direction of the substituted tribunal at an earlier stage of the action, and thus have avoided the expense and delay of a fruitless litigation, but the cases above cited hold that the proceedings in this court are not a waiver of the objection to jurisdiction.

The judgment appealed from should be reversed.

ROBINSON, *J.*— The eleventh section of the judiciary act of congress, passed September 24, 1789, conferred original jurisdiction on circuit courts of all such of a civil nature where the matter in dispute, exclusive of costs, exceeded the sum or value of $500, and an alien was a party, or the suit was between a citizen of the state wherein it was brought and a citizen of another state, provided that no circuit court shall have no cognizance "of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless a suit may have been prosecuted in such court to recover

the said contents if no assignment had been made except in cases of foreign bills of exchange." And section 12 of the same act authorized any act commenced in any state court against an alien or citizen of another state when the amount in dispute, exclusive of costs, exceeded the sum or value of $500, to be removed by the defendant to the circuit court in the manner there provided. The act of July 27, 1866 (14 *Stats.*, 306) extended this privilege of removal in certain cases as to aliens and citizens of another state joined as defendants with other defendants not entitled to its benefits, and this privilege was further extended by the act of March 2, 1867, under other certain circumstances to cases where either a plaintiff or defendant was a citizen of another state than that of the other party, and made oath that he could not have a fair trial on account of local prejudice or influence (*Bushnell* agt. *Kennedy*, 9 *Wall.*, 387). The supreme court of the United States held that the restriction in section 11 of the act of 1789, against a circuit court taking cognizance of a suit instituted on behalf of an assignee unless it might, without such assignment, have been brought therein by the assignor, did not apply to a case removed into the circuit court by a defendant who was an alien or citizen of another state, although the plaintiff, the assignee of the cause of action, could not have brought the action in the circuit court.

In *Ayres* agt. *The Western Railroad Co.* (45 *N. Y.*, 264) the court of appeals recognized the same principle that the proviso or prohibition of the eleventh section not being found in the twelfth and the reason for it not existing, the defendant's right of removal (the other circumstances concurring) was complete. In *Barclay* agt. *Levee Commissioner* (1 *Woods* [5 *Circuit*], 254), it was held that the provisions of the act of 1867, for the removal of causes from the state courts, overrode the limitation in the eleventh section of the act of 1789, declaring that the circuit courts should not have cognizance of actions on choses of action, except foreign bills brought by an assignee, unless they might have been maintained by the

assignor if no assignment had been made. Whatever criticism might be applied to that restriction in the said eleventh section under the facts of this case as to whether the claim of the plaintiff for goods, wares and merchandise sold by his assignor to the defendant, as coming within the proviso, and a suit to recover the contents of a promissory or other chose in action, "the present case is free from any cavil in that respect. An examination of the act of congress of March 3, 1875, which presents the question of jurisdiction, raised by the defendant in this case, shows that the first section is but a substantial re-enactment of the eleventh section of the act of 1789, as above recited, and has reference solely to cases of original cognizance by circuit courts, and that section 2 is in principle but a brief embodiment of the right of removal conferred by the acts of 1789, 1866 and 1867, with such further rights, in that respect, as the Constitution justified congress in conferring upon the federal courts in respect to controversy between citizens and aliens, and between citizens of different states. While the acts of 1789 and 1866, limited such right of removal to defendants, that of 1867 also conferred it upon plaintiff, in special cases, and the act of 1875, in enacting that in any suit of a civil nature then pending or thereafter to be brought in a state court, in which there was a controversy between citizens of different states, either party might remove it into the circuit court of the proper district, but extended within constitutional limits the right conferred on congress, in that respect, by the Constitution. The principles decided in the cases above referred to in the United States court and in our court of appeals, are plainly applicable to, and control the construction of the second section of the act of 1875. The right of defendant to a removal of the present action to the circuit court of the district seems to have been perfect, although the suit may have been one by plaintiff, as assignee of a chose in action, in respect to which no such cases have been maintained in the circuit court by his assignor, if no assignment had been made. He had complied with all the requirements

of the act to effect such removal, and the case was one within the provisions of the act. Thereafter, all proceedings in this court were *coram non judice* (*Fisk* agt. *Union Pacific R. R. Co.*, 10 *Abb. Pr.* [*N. S.*], 457; *Stevens* agt. *Phœnix Fire Ins. Co.*, 41 *N. Y.*, 14; *Holden* agt. *Putnam Fire Ins. Co.*, 46 *id.*, 1; *Taylor* agt. *Shew*, 54 *id.*, 75).

The judgment should, for this reason, be reversed.

DALY, *C. J.* — I concur in the construction given to the act of 1875, and that the judgment should be reversed.

Judgment reversed.

SUPREME COURT.

BARKER and another agt. HOFF, trustee.

Account stated — pleading.

An account stated or settled is a mere admission that the account is correct; it is not an estoppel. The account is still open to impeachment for mistakes or errors. Its effect is to establish *prima facie* the accuracy of the items without proof, *and the party seeking to impeach it is bound to show affirmatively the mistake or error alleged.*

Where a plaintiff desires or intends to impeach an *account stated* for error or mistake, he must allege the existence of such error or mistake in his pleadings.

The rule is that where, upon a general bill for an account, the defendant sets up a stated account in bar, the complainant will not be permitted to show mistakes or errors in such account, but must amend his bill, as the settled account is *prima facie* a bar to the suit until specific errors are assigned.

Where the reply of the plaintiff alleged no error in the account, except that it was not a full account and was made for the specific purpose of inducing Townsend to act as trustee:

Held, that the reply does not contain such allegations as bring the plaintiff within the rule; and he having failed to establish that the account was made for the purpose alleged in the reply, is not in a position to attack the account as erroneous.

Special Term, June, 1876.

THE action was brought to recover for commissions and expenses earned and incurred by Smith Barker, the plaintiff's intestate, as trustee of the estate of John Pentz, deceased.

The answer set up an account stated, made and rendered by the plaintiff, and full and complete payment and satisfaction.

The plaintiff replied, alleging that, at the request of the defendant, and to induce one Sylvanus Townsend to consent to act as trustee of the estate of John Pentz, he made up and signed the statement of account set up in the answer, but that it was made not as a final settlement, but to show to said Townsend in order to induce him to act as trustee; and it was then agreed that as soon as a trustee should be appointed a full accounting should be had.

Mr. Rowan, for plaintiff.

Mr. Hill, for defendant.

LAWRENCE, *J.* — The general term of this court, in reversing the judgment rendered at the special term on the first trial of this action, held that the defendant was not entitled to judgment on the pleadings, and that if the account "was not given as an account stated, the accounts are still open; and if it was under the forms of pleading adopted, and the allegations made, the *plaintiff is remediless* in this action."

Since this intimation of the opinion of the general term, as to the effect of the pleadings, this cause has been tried before me, and the circumstances under which the account relied upon by the defendant was made out have been fully stated by the respective witnessess.

There is the most direct conflict in the testimony of these witnesses, but one fact is, I think, established, and that is, that the account was not made out for the purpose of inducing Townsend to act as executor and trustee under the will of Pentz.

The reply alleges that the account was made for that purpose, but it is quite apparent that Townsend had declined to act long before the account was stated and the certificate was signed. This is the sole ground on which the plaintiff attacks the account in his reply, and failing in establishing that such was the object and purpose of making the account

and certificate, the plaintiff must fail altogether. The burden of proof in establishing that the account and certificate are not, in point of fact, that which upon their face they purport to be, is upon the plaintiff.

On the face of the account and certificate it would appear that there had been a full and final adjustment, and an account stated between the estates of Barker and Pentz. The plaintiff is not precluded from showing that the fact is otherwise, but the burden of doing so rests upon him. In *Lockwood* agt. *Thorne* (18 *N. Y.*, *p.* 292) judge SELDEN says: "An account stated or settled is a mere admission that the account is correct. It is not an estoppel. The account is still open to impeachment for mistakes or errors. Its effect is to establish *prima facie* the accuracy of the items without proof, *and the party seeking to impeach it is bound* to show affirmatively the mistake or *error alleged*."

The plaintiff, therefore, could impeach this account for error or mistake (although a stated account) if he had alleged that such error or mistake existed. The difficulty is, that there is no such allegation in the plaintiff's pleadings. The complaint does not refer to the account delivered to Hoff. The action, so far as its character is to be determined from the complaint, is for a general account. By the reply, the account is assumed to be correct to the extent to which it goes. The rule always has been that where, upon a general bill for an account, the defendant sets up a stated account in bar, the complainant will not be permitted to show mistakes or errors in such account, but must amend his bill as the settled account is *prima facie* a bar to the suit until specific errors therein are assigned (*Weed* agt. *Small*, 8 *Paige*, 575, *and cases cited*). No error is alleged in the account in the plaintiff's reply, save that it was not a full account, and was made for the specific purpose of inducing Townsend to act as trustee.

Assuming, then, that the court would be entitled to look into the reply for the purpose of ascertaining the character

of the action, and that if the reply were sufficiently specific in alleging errors and mistakes in the account, relief might be awarded upon the whole case, as if a proper complaint had been filed in the first instance, it is clear that the reply under consideration does not contain such allegations as bring the plaintiff within the rule adverted to (*Weed* agt. *Small*, *supra*). Furthermore, if I correctly understand the decision of the general term, before referred to, the court entertained the opinion that, unless the plaintiff on the trial failed to establish that the account in question was not an account stated, he would be remediless in this action, for the reason that he had not pleaded that it was erroneous. Such is my understanding of the pleadings; and as no motion was made to amend them, the case must be disposed of upon the pleadings as they stand.

It was argued by the plaintiff's counsel that the account relied upon by the defendant could not be regarded as an account stated for the reason that Hoff did not represent the estate of Pentz at the time that the account was prepared, and that, therefore, the account is to be deemed as given to a mere stranger.

It appears, however, that he was representing the beneficiaries under the will at that time, and that the plaintiff was dealing with him as such representative. How, then, can the plaintiff question the validity of the account on the ground of Hoff's want of authority to bind or to act for the estate of Pentz. It is admitted that he negotiated with the plaintiff, on behalf of the beneficiaries of the estate, and it does not appear that the plaintiff ever challenged his right to thus act; and while thus acting the account was prepared and the certificate delivered and Hoff became the trustee under the will in the place of Barker.

It seems to be not going too far to hold that, under this state of facts, the defendant's acts related back from the time of his appointment to the time when he first assumed to act or to interest himself in the matter of adjusting the accounts

between the estates of Barker and of Pentz, and that as to the plaintiff he may be justly regarded as having acted for the estate of Pentz at the time he received the account (*Perry on Trusts, sec.* 245, *and cases cited*). Again, I think that the general term necessarily determined the point now under consideration adversely to the plaintiff. The reply which was before the court alleges in substance that Hoff, at the time of obtaining the account, was not acting in an official capacity, but that he pretended to represent the beneficiaries. It must be remembered that the case went before the general term on the pleadings alone, the court below having dismissed the complaint on the motion of the defendant's counsel. The case stood then as if there had been a demurrer to the reply. Now, if the plaintiff is right in his position the court would have declared that on the facts conceded by the defendant in moving to dismiss the case on the pleadings it was clear that there could be no account stated for the reason that Hoff had no right to act for the estate of Pentz, and yet it was held that the issue *as to the character of the account should be tried* (*See opinion of* BRADY, *J.*, 7 *Hun*, 284). Finally, I am of the opinion that the plaintiff has failed to establish that the account was made for the purpose alleged in the reply; that the acount is, therefore, to be deemed as a *prima facie* bar to this action, and that the plaintiff has not, by his pleadings, put himself in a position to attack the account as erroneous.

The complaint must 'be dismissed, with costs to the defendant.

Findings may be settled on two days' notice.

SUPREME COURT.

ELIZABETH LANGDON agt. LANDON C. GRAY and ELIZABETH B. PHELPS.

Mortgage — Bonus paid for extension of payment — Usury.

Where G., on the application of L., agreed to advance moneys, and take an assignment of two valid mortgages made by L., and which mortgages were due and held by one T., the agreement being that L. should extend the payment of both mortgages, and should advance the further sum of $3,000, to be secured by a mortgage to be made by L., and that L. should pay to G. a bonus of ten per cent upon the moneys advanced for the accommodation and for the forbearance; the $3,000 mortgage being made, in part, to raise the funds with which the ten per cent bonus was to be paid, and which was actually paid thereout:

Held, that the two mortgages first above mentioned, of which an assignment was taken by G., the full amount of principal and interest thereon being paid to T., the holder, were valid securities in the hands of G.

Also, that the $3,000 mortgage made to cover the ten per cent bonus was usurious and wholly void.

And where, after the expiration of the year above named, a further bonus of ten per cent was exacted by G. and paid by L. for a further extension of a year, *held*, that the sum paid by way of bonus should be credited on the two mortgages first above mentioned.

Where a chattel mortgage was made to secure, in part, a valid debt, and in part the payment of a note given upon an usurious agreement, *held*, that the chattel mortgage could only be enforced to the extent of the valid debt, and as to the residue it was void.

IN May, 1873, the plaintiff was the owner of premises 279 Fourth avenue, New York city; the holder of the second mortgage thereon had procured a judgment of foreclosure for upwards of $6,000, and he also held a third mortgage for $1,450. The plaintiff applied to John A. Kamping, a broker, for moneys to pay said mortgages; the broker pro-

cured the money on condition that plaintiff would pay a bonus of ten per cent. Plaintiff requiring more money, the broker procured the further sum of $3,000, on the same terms. The actual amount thus agreed to be loaned was $11,432.30, and the defendant Landon C. Gray, was the party ostensibly loaning the money, though the negotiations were conducted through W. Farley Gray the agent and attorney in fact of L. C. Gray, the son of W. Farley Gray.

When the transaction was closed, at the office of Mr. James Thomson (the holder of the judgment and mortgage of $1,450), the defendant Gray took an assignment of the decree of foreclosure and the $1,450 mortgage, the amount then due Mr. Thomson being $8,432.30; and plaintiff gave the defendant Gray a mortgage for $3,000, covering the premises 279 Fourth avenue and 281 Fourth avenue, payable in one year; and the defendant Gray, by his agent and attorney, stipulated in writing to extend the time of payment of the decree and the mortgage for $1,450 mortgage for one year.

The defendant Gray gave his check for $7,189 (which was not produced), and W. Farley Gray testified on the trial that he handed the plaintiff $3,000 in cash. The plaintiff testified that she only received $1,756.77, out of which she paid Kamping $114.32 commissions, and produced a statement in the handwriting of Kamping, who was present to corroborate her evidence. Mr. Thomson testified that he received the full amount due him, $8,432.30, but did not remember who gave him the difference between the check for $7,189 and the amount due him. He also testified that no one ever applied to him for the sale of his securities, but that plaintiff informed him she had raised the money to pay him.

It thus appeared that, on the day of the closing of the transaction, $10,189.07, and no more, was paid by the defendant Gray for the loan of $11,432.30 thus negotiated, leaving $1,243.23 for bonus. The $100 over and above the ten per cent was claimed to be retained by W. Farley Gray for "extra services." It was claimed by the defendant Gray

that the mortgages held by Mr. Thomson were purchased at a discount of ten per cent, and the balance of the $1,243.23, to wit, $400, was for the services of W. Farley Gray in examining the title. The broker, Kamping, swore that the word "loan" was never mentioned by him or the plaintiff in the negotiation, and that the idea of a "loan" was never in his mind. He was confronted on the stand by his receipt, all in his own handwriting, for $114.32, "in full for commissions on *procuring loan* of $11,432.30."

At the end of the year the plaintiff was required to pay, and did pay, a further ten per cent bonus on the loan of the $11,432.30.

At the end of the second year, being unable to pay a third bonus, and under threats of foreclosure, she executed a chattel mortgage for $2,861 upon her furniture, to the defendant Gray, to secure certain advances, and a part of the bonus for the extension, and was also required to assign the rents of the premises to W. Farley Gray, then leased for $6,500 per annum; out of which rents the taxes and interest were to be paid, and out of which she was to receive fifty dollars per month for her support — which latter amount she never did receive. In November, 1876, and in violation of the agreement to extend the loan, the premises were advertised for sale, under the decree assigned to the defendant Gray — at which point this action was brought and an injunction obtained.

In his answer, the defendant Gray claimed that he had no interest in the securities, having assigned them before this action to the defendant Phelps, who resided on the premises; whereupon, Mrs. Phelps was made a party.

Further facts appear in the opinion of the court.

Charles W. Dayton and *Albert Cardozo*, for plaintiff.

Home & Sanders, for defendant Gray.

Shearman & Sterling, for defendant Phelps.

Langdon agt. Gray.

VAN VORST, *J.* — The plaintiff was pressed by her creditor for the payment of two mortgages upon her property, upon one of which a judgment of foreclosure and sale had been obtained; the other was due. In her straits, she applied to the defendant Landon C. Gray, through one Kamping, a broker, for aid.

As far as the two mortgages are concerned, the facts justify the conclusion that the understanding of the parties was, that the defendant Landon C. Gray should provide the funds and take an assignment thereof, with the judgment of foreclosure, and give forbearance to the plaintiff for one year.

It was also understood that the defendant should loan the plaintiff the sum of $3,000, in addition, for which he was to receive a mortgage upon the plaintiff's premises. It was agreed that the defendant should receive a bonus of ten per cent for his aid and forbearance.

The defendant Landon C. Gray claims, however, that the ten per cent was to be computed upon the two mortgages only. The evidence justifies the conclusion that it was the understanding of the parties that the bonus was to be paid out of the $3,000 agreed to be loaned.

The two mortgages and the judgment of foreclosure were held and owned by James Thomson, upon which there was due and owing, when the transaction was closed, the sum of $8,432.30. The parties met at Thomson's office to pay the money due him, and receive assignments of the mortgages and judgment. The defendant's agent, who had represented him in the previous negotiations with the plaintiff and the broker, brought to Mr. Thomson's office a certified check for $7,189.07, and $3,000 in currency.

The check he delivered to Mr. Thomson, and the $3,000 in currency he claims to have delivered to the plaintiff, and in this he is substantially corroborated by the broker, Kamping. The plaintiff, on the other hand, testifies that she received only the sum of $1,756.75 in money. The fact is, that Thomson received the balance of his claim, over and

above the check, from either the plaintiff or the agent of the defendant. As far as the result is concerned, I do not think it makes any difference which of the parties paid it. It was paid from the $3,000 ostensibly loaned to plaintiff. Upon the receipt of the whole sum due him, Thomson delivered to the agent of the defendant assignments of the two mortgages and the decree of foreclosure, and the agent received from the plaintiff a mortgage for $3,000.

The securities which the defendant Landon C. Gray, through his agent, received, amounted to $11,432.30, yet he paid and advanced only $10,189.25. The difference between these two sums, $1,243.25, and which was not paid by the defendant, was designed to cover the bonus agreed to be paid the defendant for his accommodation, and was retained for that purpose, and for professional services rendered by the defendant's agent, who is an attorney and counselor at law.

If the bonus was computed only on the amount of the Thomson mortgages, as is claimed by the defendant's agent, there was an excess of $400 which is claimed by him for such services.

I find nothing in the case which justifies the conclusion that it was understood and agreed that the defendant's agent and attorney should receive compensation to that amount for any services he might render in the matter. On the other hand, if the ten per cent was computed on the whole amount of $11,432.30, there would still be an excess of $100 to cover such services, and Kamping, the broker, says such sum was retained or received by the defendant's agent for extra services in the matter.

Taking the defendant at his word, that he was to purchase the mortgages from Thomson and hold them for one year, and as Thomson was to make, and did make, no deduction from the amount due him, it can, as already observed, make no real difference whether he or the plaintiff paid to Thomson the amount of $1,243.25, over and above the check for $7,189.07, out of the $3,000. The defendant received assign-

ments of the mortgages for the full amount which was actually paid.

In this view, the plaintiff did not receive, nor was it the understanding of the parties that she should receive to her own use the $3,000, the payment of which was secured by her mortgage. The payment thereout of the sum of $1,243.25 was a method resorted to by the parties of securing to the defendants an illegal bonus or premium on the loan, and forbearance of money over and above the interest allowed by law.

That such bonus should be paid was a part and parcel of the negotiation which resulted in the assignment of the two mortgages, and the making of the additional one for $3,000.

The vice of usury enters into the $3,000 mortgage made to raise the amount to satisfy this illegal claim. The moneys ostensibly secured thereby being, with the understanding of all concerned, used for such unlawful purpose.

I do not think that this attempt to evade the statute against usury affects the two mortgages assigned; they were valid instruments, and were, in fact, purchased by the defendant. He did, in effect, pay the whole amount claimed by Thomson. Without payment in full, he could not, as he well knew, secure the assignments; and the result is, that the $3,000 mortgage covers the excess paid on the purchase over and above the certified check, and this includes the illegal bonus exacted on the transaction. In this view, the $3,000 mortgage is illegal and void.

In addition to this, at the expiration of the year from the making of the assignments, the plaintiff not being prepared to pay, a new bonus of $1,100 was demanded from her, and paid partly in cash, and the residue by her note to the defendant's order.

The case of *The Real Estate Trust Company* agt. *Keech* (7 *Hun*, 253), while it holds that the payment of a bonus, in addition to lawful interest on the extension of a valid debt, does not invalidate the debt, yet decides that the amount paid

in excess of legal interest should be applied as a payment on the mortgage.

Whatever amount has been paid by the plaintiff as a condition of subsequent extension, over and above lawful interest, should be applied upon the two mortgages, and they should be reduced *pro tanto*.

The chattel mortgage referred to in the pleadings and in the evidence, while it was in part given to secure a valid debt, also includes the amount of a note for $500, given as a condition for the extension of previous advances. To this extent it is invalid.

The action of W. Farley Gray in the matter of the extension, and the bonus exacted, must be regarded as the action of the defendant Landon C. Gray, whom he, in truth, represented, and for whom he acted in all the negotiations.

Judgment must be given in pursuance of the above directions, and findings made accordingly. Under the pleadings and proofs, I do not think a tender of the valid claims covered by the chattel mortgage was necessary as a condition to maintaining this action.

SUPREME COURT.

ISAAC V. FRENCH, receiver, &c., agt. LAWRENCE O'BRIEN.

Corporations — Savings banks — what amounts to a ratification by the trustees of the president's acts.

A resolution regulating, generally, the duties of the president of a savings bank, which duties were already carefully defined by the by-laws, and which by-laws provide that they can only be amended in a certain manner (*i. e.*), after giving the notice and taking the steps required by the by-laws, is not valid where no such notice is given. Such resolution confers no authority on the president.

A person dealing with an officer of a corporation, whose duties are regulated by the by-laws, is chargeable with notice of his authority, and of the limitations and restrictions upon it contained in the act of incorporation and by-laws.

A subsequent ratification by the trustees of the president's acts, will not be inferred in the absence of proof showing that the board of trustees had notice or knowledge of the unauthorized acts of its president.

The provisions of section 9 of article 1 of title 2 of chapter 18, part 1 of the Revised Statutes of this state, which regulate the distribution of the property of corporations *only* in cases of insolvency, actual or contemplated, is suspended or superseded by the bankrupt law of the United States.

Where a bond and mortgage is transferred partly in payment of a precedent debt, and partly for a consideration paid at the time, the purchaser will not be regarded as a holder for value as against one having the legal title or a prior equity, so far as the assignment was received in payment of the precedent debt, but is entitled to a lien for the amount of the consideration paid, and to a repayment of that amount before he will be required to reconvey the bond and mortgage.

The defendant was a depositor in the People's Savings Bank. On November 3, 1875, he purchased of said bank (through its president) a certain bond and mortgage held and owned by the bank, paying for said bond and mortgage $14,389.78 cash, and being debited on the books of said bank the amount of his balance on deposit $10,821.18. At the time of

the purchase and transfer, the bank was insolvent (though not known so to be by the defendant).

In an action by the plaintiff as receiver of the bank for an accounting for the bond and mortgage and the value and proceeds thereof, and for an injunction restraining the defendant from assigning or creating any lien upon the same, and asking for the appointment of a receiver of the bond and mortgage:

Held, First, that the suit is of an equitable character, and such as would in former times have been cognizable by the court of chancery.

Second, that the action being one of an equitable character, the principle that one who comes into a court of equity must come prepared to do equity, and to refund as much as he has received upon a transaction which is voidable and void, applies.

Third. The claim that the plaintiff in such case should do equity, by putting the defendant in the position in which he stood before the transaction was consummated, is not a *set-off* or *counter-claim*, and therefore need not be pleaded.

Held, also, that the defendant should assign the bond and mortgage to the plaintiff, on receiving from him the sum of $14,389.78, with interest, and being reinstated as a creditor upon the books of the bank in the sum of $10,821.18.

THIS action is brought by the plaintiff as receiver of the People's Savings Bank of the city of New York.

Prior to the 3d day of November, 1875, the People's Savings Bank was the owner and holder and in the possession of a certain bond and mortgage made by one John Garvey, dated on or about the 18th day of September, 1871, for the sum of $25,000. There was due thereon on November 3d, 1875, accrued interest to the amount of $210.96. Said mortgage was upon a certain lot situated on the south side of Fiftieth street, between Fifth avenue and Madison avenue, in the city of New York. The complaint alleges, among other things, that on or about November 3d, 1875, the president of said bank, one Charles F. Rodgers, by an instrument in writting made in the name and on the behalf of said bank, or purporting to be by its authority (but which said Rodgers had no authority to make, either by the charter or by-laws of said bank, or by any resolution of its trustees or otherwise), sold, assigned and transferred to the defendant said bond and

mortgage, and delivered the same to the defendant, who has never restored the same to said bank or to said receiver; that said assignment or transfer was never authorized by a previous resolution of the board of trustees of said bank, or by any other resolution of said trustees or by any consent thereof; that the defendant knew, at the time of said assignment and transfer, that no such resolution had been passed and that no such consent had been given; that the defendant did not pay a present and valuable consideration for said bond and mortgage to the full extent of its value, but paid on or about November 3d, 1875, the sum of $14,389.78 in cash, and as to the balance, to wit: the sum of $10,821.18 (making up the amount of said mortgage and the accrued interest thereon), was debited upon a deposit of that amount then owing to him by said bank; that said charging said deposit as a payment by defendant was not authorized by the board of trustees of said bank, which was well known to the defendant at the time. The insolvency of said bank, and the knowledge of the defendant of such insolvency at the time of the assignment is also alleged, and that said transfer was made with the intent of giving to the defendant a preference over the other creditors and depositors of said bank. The prayer of the plaintiff is that the defendant may be decreed to account to him for said bond and mortgage, and the value and proceeds thereof, and for an injunction restraining the defendant from assigning or creating any lien or incumbrance, either upon the bond and mortgage or the proceeds thereof, and for the appointment of a receiver of the bond and mortgage.

The answer admits the ownership and possession of said bond and mortgage by the bank on November 3, 1875, and its assignment and transfer to the defendant, but denies that the said sale, assignment and transfer were never authorized by any previous resolution of the board of trustees of said bank, or by any consent thereof, and also denies that at or prior to said assignment he had any knowledge or information that such authority or resolution or consent had not been

given; but avers that he was informed at the time of the purchase that said bank had duly authorized the sale and transfer, and that such sale and transfer was with the authority and consent of said bank duly and regularly given and made, and that he believed said information, and bought said bond and mortgage, relying upon the truth thereof. The defendant denies that he did not pay a present and valuable consideration upon said sale, purchase and transfer of said bond and mortgage to the full extent of its value; but admits that the consideration was paid in manner and form as set forth in the complaint. The defendant also denies that, at the time of the sale and transfer of the bond and mortgage, he had any knowledge or information of the insolvency of the bank, or whether or not the trustees had any such knowledge. He denies that the said transfer was made with intent of giving to him a preference over the other creditors and depositors of said bank, but avers that the purchase of said bond and mortgage was made by him in good faith, and for a full value.

F. C. Barlow, Esq., for plaintiff.

A. Gilhooly, Esq., for defendant.

LAWRENCE, *J.* — Having given to the testimony in this case and to the very able briefs, filed by the learned counsel, the fullest consideration in my power, I have reached the following conclusions:

First. That the resolution of September 29th, 1873, was not valid, for the reason, that in substance and effect it was an alteration of the by-laws of the bank, enlarging the general power and duties of the president, substituting his discretion and judgment for the discretion and judgment of the trustees and of the finance committee, and that such by-laws could only be amended after giving the notice and taking the steps required by article 15; and that there is no proof that such notice was given or steps taken.

Second. That the evidence does not establish a ratification by the trustees of the president's act, in selling the bond and mortgage to the plaintiff, inasmuch as it does not appear that the trustees knew any thing about the transfer (*Dabney* agt. *Stevens*, 40 *Howard*, 341; *Smith* agt. *Tracy*, 36 *N. Y.*, 79).

Third. That the defendant was ignorant of the condition of the People's Savings Bank, and whether the same was solvent or insolvent, and that in foreclosing the bond and mortgage he acted in good faith, and that his attorney, Mr. Thompson, relied upon the statement of Rodgers, the president of the bank, that he had authority to make such transfer.

Fourth. That the People's Savings Bank was, in point of fact, at the time said assignment was made, wholly insolvent and unable to meet its obligations and liabilities, and that such fact was known to the said Rogers and to the trustees of the bank, or to a majority of them.

Fifth. That section 9 of article 1, of title 2 of chapter 18, part 1 of the Revised Statutes of this state, is suspended or superseded by the bankrupt law of the United States (*Commonwealth* agt. *O'Hara*, 6 *American Law Register*, *p.* 765; *Griswold* agt. *Pratt*, 9 *Metc.*, 16; *Shears* agt. *Solhinger*, 10 *Abb.* [*N. S.*], *p.* 288, *and cases cited by* BRADY, *J.*; *In re Eames*, 2 *Story*, 322).

Sixth. That the defendant is a *bona fide* holder of the bond and mortgage in question to the extent of $14,389.78, being the amount paid by checks or drafts on other savings banks at the time of the assignment of the said bond and mortgage, and that to that extent the defendant is entitled to a lien on said bond and mortgage, and to the repayment of said sum, with interest, before he should be compelled to reassign or reconvey said bond and mortgage to the plaintiff (*Weaver* agt. *Barden*, 49 *N. Y.*, 286).

Seventh. That to the extent of the aforesaid sum of $14,389.78, the said defendant is a purchaser of the said bond

and mortgage for a valuable consideration, and without notice within the meaning of section 8 of article 1 of title 2 of chapter 18, part 1 of the Revised Statutes.

Eighth. That as to the sum of $10,821.18, the amount represented in the pass-books of the defendant, and on the books of the said People's Savings Bank, as due to the defendant from the said bank, the said defendant, by relinquishing to the said bank said pass-books, and consenting to the crediting of the said sum on the books of said bank as having been paid, did not thereby become, as against the plaintiff in this action, nor as against the other creditors of or depositors in said bank, a purchaser for value of said bond and mortgage; and that to the extent of $10,821.18 of the principal sum represented and secured by said bond and mortgage the defendant is not a *bona fide* purchaser, and that the part of the consideration paid in that manner does not avail the defendant in this action (*Weaver* agt. *Barden*, 49 *N. Y.*, 286).

Ninth. That the effect of the transaction between the defendant and Rodgers was to give to the defendant a preference over the other creditors and depositors of the People's Savings Bank to the extent of his deposit, and that the plaintiff, as representing such creditors, has a superior equity to the defendant, so far as the consideration paid on the assignment of said bond and mortgage consisted of the crediting of the aforesaid sum of $10,821.18 upon the books of said bank as paid.

Tenth. I do not regard this as an action at law, as is contended by the learned counsel for the plaintiff. The suit is brought to compel the defendant to account to the plaintiff for the bond and mortgage and the value and proceeds thereof, and for an injunction restraining the defendant from assigning or creating any lien or incumbrance, either upon the bond and mortgage or the proceeds thereof; and it is prayed in the complaint that a receiver of the bond and mortgage be appointed.

The suit, therefore, is of an equitable character, and such

as would in former times have been cognizable by the court of chancery.

Eleventh. The action being of an equitable character, the principle that one who comes into a court of equity must come prepared to do equity, and to refund as much as he has received upon a transaction which is voidable or void, applies (*Williams* agt. *Fitzhugh*, 37 *N. Y.*, 453, *and cases cited; Town of Venice* agt. *Woodruff*, 62 *N. Y.*, 463).

Nor do I understand that the claim that the plaintiff in such a case should do equity by putting the defendant in the position in which he stood before the transaction was consummated is a set-off or counter-claim and therefore must be pleaded. It is not *new matter* constituting a defense or counter-claim in the language of the Code, but rather matter necessarily shown and proved as a part of the entire transaction which the plaintiff seeks to set aside.

If this conclusion is incorrect, then I am of the opinion that, as all the facts have been proven, and as it does not appear that the plaintiff can claim that he has been surprised, if an amendment is necessary to enable the defendant to invoke the principle referred to, justice requires that the proper amendment should be granted.

Twelfth. The judgment in this case will therefore be, that the defendant assign the bond and mortgage to the plaintiff on receiving from him the sum of $14,389.78, with interest, and upon the plaintiff returning to the defendant the pass-books surrendered to Rodgers, and reinstating the defendant as a creditor upon the books of the People's Savings Bank in the sum of $10,821.18.

As I do not regard the case as free from doubt, and as neither party has wholly succeeded, costs should not be allowed to either party.

The findings may be settled on two days' notice.

N. Y. COMMON PLEAS.

Moses D. W. Shepmoes agt. Othelia Bowsson.

Examination of parties before trial.

The examination provided for by section 391 of the Code is limited to cases where a discovery would have been previously ordered in equity in aid of the prosecution or defense of the action.

The affidavit upon which the application for the examination is based must state: 1st. The nature of the action and the plaintiff's demand. 2d. If by the defendant, the nature of his defense. 3d. How any fact sought to be discovered and within plaintiff's knowledge can be applicable or material.

Where these statements are not made, the application lacks every essential element of such a proceeding as justified a bill of discovery before the Code, or any license of examination which *it* affords, and is an inquisitorial and fishing proceeding, condemned by all the authorities applicable to the subject.

A party cannot be examined at the instance of his adversary, except on matters which that adversary is bound to prove as part of his case.

Where, as in this case, all the matters which the defendant seeks to elicit, by way of discovery or proof, from her adversary, are such as he is in the first instance bound to maintain and prove as essential to his case, before she is in any way called upon to enter upon her defense, the application should be denied.

The examination should only be allowed when it appears that it is sought for in good faith, for purposes of discovery of matters resting peculiarly in the knowledge of the adverse party, and the testimony sought is material to the case of the party seeking the examination, but *never* for the mere purpose of eliciting the grounds or sources of the adverse claims or the evidence by which it is to be established.

Special Term, February, 1877.

Shepmoes agt. Bowsson.

APPLICATION for an order for the examination of the adverse party before trial.

T. C. Campbell, for defendant.

ROBINSON, *J.* — In my opinion an examination of the plaintiff, in respect to the matter mentioned in the affidavit upon which the application is founded, is not authorized under any of the provisions of the Code, and no case for any such discovery as is required by rule 21 of the court rules, is presented which justifies the order applied for. While, by section 389 of the Code, an action for a discovery in aid of the prosecution or defense is abolished, the mode of examination given by the subsequent sections provides a substitute. By section 390 a party to an action may be examined as a witness at the instance of an adverse party or of any one of several adverse parties, and for that purpose may be compelled in the same manner and subject to the same rules of examination as any other witness, to testify either at the trial, or conditionally, or on commission. By section 391 it is provided, that instead of the examination being had at the trial, as provided in section 390, it may be had at any time, at the option of the party claiming it, before a judge of the court or a county judge, or a referee to be appointed by a judge of the court, and at a time and place and upon summons and order as provided for.

By section 392, the party so to be examined may be compelled to attend in the same manner as a witness who is to be examined conditionally; thereby making reference to the provisions of the Revised Statutes on that subject, which (2 *R. S.*, 393), by section 2, require the application for the examination of the witness to be made upon an affidavit stating: First, the nature of the action and the plaintiff's demand; second, if by the defendant, the nature of his defense; third, the name and residence of the witness; fourth, that the testimony of such witness is material and necessary

for the party, making such application, in the prosecution or defense, as the case may be. Subdivision 5 is inapplicable, and either of these provisions would also be inapplicable where an examination is sought before issue or pleading, as in *Glenny* agt. *Stedwell* (51 *How. Pr.*, 329; *S. C.*, 1 *Abb.*, *N. Ca.*, 329). Section 3 provides that if the officer to whom such application for a conditional examination of the witness is made shall be satisfied that the circumstances of the case require the examination of such witness to obtain justice between the parties, he shall make the order requiring the adverse party to appear before such officer and attend such examination. (In this proceeding it may be before either a judge, a county judge, or a referee.) Section 10 prescribes the mode of summoning the witness (*Green* agt. *Herder*, 20 *How. Pr.*, 210).

By section 470 of the Code, the judges of the higher courts were authorized to make such rules, not inconsistent with the Code, as might be necessary to carry it into effect; and by rule 21 they have provided that the application for an examination, under section 391 of the Code, should be upon affidavit, disclosing the nature of the discovery sought to enable the party applying to prove his case or defense on the trial, and how the same is material in aid of the prosecution or defense, as the case may be (*See Story Eq. Pl.*, *secs.* 321 *to* 326).

These provisions require in the application, if made after issue joined, the statements specified in the Revised Statutes (2 *R. S.*, 393, *sec.* 2), as well as those exacted in the twenty-first rule, showing the existing materiality for the examination of the party as a witness to the case of the party seeking his examination, by a disclosure of the nature of the discovery sought, to enable the party to plead or to prove or maintain his case on the trial, and how the same is material in aid thereof.

The provision of section 392, providing for the obtaining or enforcing of such examination before trial "in the same

manner as of a witness who is to be examined conditionally," adopts the same measures and course of proceeding as in that case, so far as applicable, and leaves the application to the judgment and discretion of the judge, on a case presented by affidavit that satisfies him the examination of such witness is required "to attain justice between the parties." Rule 21 was adopted to the same end, and, unless inconsistent with the Code, was but a proper exercise of the authority given the judges to carry its provisions into effect. It was but in harmony with the intentions of the legislature as expressed in section 392, to adopt the provisions of the Revised Statutes as to the mode of procuring the examination of a witness conditionally and with reference to the prior law; the requirements of rule 21 innovate upon no absolute right given by the Code, but merely prescribe the mode of its exercise. No substantial right undisclosed by affidavit, can be affected by a denial of an application that does not conform to the statutes and rule, or fails to disclose such a case, in all its features, that from the circumstances so presented a denial of the application would plainly prevent "the attaining of justice between the parties."

The right of a party to require his adversary to attend and be examined as a witness on his behalf, so far as it is a substitute for a bill of discovery, is confined to such matters as might be legitimately made matters of contest in such a proceeding. His application must show the existence of a cause of action or a substantial defense, as the case may be, and the particular facts sought to be elicited, the status or right of the party seeking the discovery entitling him to maintain it, and that the matter sought to be discovered is, upon the pleading or case presented, material (*Bailey* agt. *Dean*, 5 *Barb.*, 297; *McIntyre* agt. *Mancius*, 16 *Johns. R.*, 592). It is not indispensable that it be absolutely necessary (*March* agt. *Davison*, 9 *Paige*, 580; *Vance* agt. *Andrews*, 2 *Barb. Ch.*, 370). But it was not permissible through such a proceeding to ascertain the nature or grounds of the claim

made against him, so as to discover if he has any defense thereto (*Deas* agt. *Harvie*, 2 *Barb. Ch.*, 448). Its true province was to compel a party to a legal controversy to disclose matters within his knowledge or his power of informing himself, and material to the applicant's prosecution of his action or defense, so as to enable the latter to form his pleading or prove his case, but not to get information as to whether he had any case, and much less to explore his adversary's case. It must not be a mere fishing proceeding, instituted with a view to pry into the case of the opposite party, as in *Newkirk* agt. *Willett* (2 *John. Ch.*, 413), wherein chancellor KENT, describing the complaint, says: "It amounts to this, the respondent has sued us at law, and we don't know for what, and therefore we ask a discovery beforehand, although we conclude he has sued us upon some groundless pretense." The principles are well stated in 1 Abbott's N. Pr. Cases, 332, in the note on what facts or circumstances rights of discovery are based.

In *Carr* agt. *Great Western Insurance Company* (3 *Daly*, 160), DALY, C. J., at general term, held that the examination provided for by section 391 of the Code was limited to cases where a discovery would have been previously ordered in equity in aid of the prosecution or defense of the action; and in a note he states that rule 21, subsequently adopted at the convention of the judges in 1873, of which convention he was a member, and concerned in framing this provision, was but an exposition of this construction assumed and adopted by the judges.

The right to so examine the adverse party to any fact material to the case of the applicant, under the rules that governed the proceeding under a bill of discovery, seems perfectly consistent with such a construction of the twenty-first rule, and does no violence to it, except so far as it might be construed to deny any right to such examination before pleading (*Glenny* agt. *Stedwell*, *supra*). The absolute right to require any person to attend and be examined as a witness

on behalf of the party subpœnaing him always depended upon the fact that the witness was personally cognizant of something material to the case of that party; and an action against him for non-attendance at the trial could not be maintained unless it was shown the case of the party failed for want of such testimony (*Pearson* agt. *Iles*, 2 *Doug.*, 556); and the lack of such an allegation or proof was a defense, as well against the remedy given by statute as for special damages (*Madison* agt. *Shore*, 5 *Mod.*, 355; *S. C.*, 1 *Salk.*, 206; *Amery* agt. *Long*, 5 *East*, 473; *Hermans* agt. *Williams*, 11 *Wend.*, 636). This consideration would not, however, prevent the exercise of the power conferred by these provisions of the Code to require the examination of a party as to any fact material to the case of his adversary, as their especial design was thereby to avoid the expense and trouble of procuring the attendance of other witnesses at the trial, when the facts sought to be established were within the knowledge of the adverse party. Notwithstanding the party summoned may be so examined, he is yet but the witness for the adverse party (Code, § 390), and is subject to the same rules of examination as any other witness called by his adversary. It is true, some such latitude of examination may be permitted as is ordinarily allowed on the examination of a witness known to be adverse and hostile; but otherwise the directions of the Code are absolute, that he is subject to the same rules of examination as any other witness called in the same interest. Such rule of examination of a witness called on a party's own behalf allows no initiation or adoption of a course of pure cross-examination, and far less were the provisions of the Code intended for any other purpose than to enable the party to prove by his adversary some facts tending to establish his case. They afford no countenance for their being used for inquisitorial purposes, or as means to pry into the adverse case, or with any view to enable a party to prepare for trial through discovery of the evidence, circumstances or witnesses by which it is intended to be supported and maintained. Within the

limits before indicated, it is, however, a right which, upon a proper case presented, the order for the examination should be granted and the testimony of the adverse party required to be given, to the extent of his knowledge, of the facts inquired of, material to the case of his adversary; but to that it ought to be limited, and especially disallowed as to questions peculiarly appropriate to a cross-examination.

The application in the present case by the defendant, to procure the examination of the plaintiff before trial, is founded on her affidavit, in which she states she is sued to recover damages, alleged by plaintiff, in consequence of her violation of her agreement to rent him certain premises, and by reason of his being turned out of possession; that she has no knowledge of any such agreement; that she desires an order and summons under the provisions of the Code above referred to, for his examination as a witness before trial; that he is a necessary and material witness on her part, and she cannot safely proceed to trial without taking his testimony, and so examining him before trial, and she expects to discover from him that no such agreement was made; that she is wholly ignorant of what property he had in his shop at the time he suffered said damage (without indicating that any such special damage was claimed); that she can prove by him what the same was and its value, and also, if any damage happened, that it was not in consequence of her agreement (probably intending any breach thereof), and that such damage was much less than as set up.

She does not disclose the nature of her defense, as required by 2 Revised Statutes, 393 (*sec.* 2, *subd.* 2), or how any fact within plaintiff's knowledge can be applicable or material. It is manifest this application lacks every essential element of such a proceeding as justified a bill of discovery before the Code, or any license of examination which it affords, and cannot be otherwise characterized than as an inquisitorial and fishing proceeding, such as is condemned by all the authorities applicable to the subject. All the matters which

she thus seeks to elicit, by way of discovery or proof from her adversary, are such as he is, in the first instance, bound to maintain and prove as essential to his case, to wit: the existence of the agreement, its breach and the extent of his consequential damages resulting therefrom, before she is any way called upon to enter upon her defense.

It is notorious that such proceedings, instituted for such purposes, seldom result in the offering on the trial of the testimony thus taken by the party procuring the examination, and that the examination thus had is ordinarily but for inquisitorial purposes and to pry into the case of an adversary. In my opinion they ought not to be encouraged or allowed, except when it appears they are adopted in good faith, for purposes of discovery of matters resting peculiarly in the knowledge of the adverse party, and the testimony sought is material to the case of the party seeking the examination, but never for the mere purpose of eliciting the grounds or sources of the adverse claims or the evidence by which it is to be established. I find no authentic report or evidence of any ruling or practice of any other of the courts of record of this state (as has been invidiously suggested) upon which this court can be regarded as backward in any just administration of those provisions of the Code, or as failing to afford any such proper means of "scraping the conscience" of an adversary before trial, that the law affords. This application is denied.

SUPREME COURT.

THOMAS NOLAN agt. WILLIAM C. HARRIS.

New trial — nominal damages.

A new trial will not be granted to enable a plaintiff to recover nominal damages, the verdict on the former trial having been for the defendant.

Special Term, December, 1876.

Francis Byrne, for plaintiff.

A. M. Card, for defendant.

VAN VORST, *J.* — The learned counsel for the plaintiff, on the coming in of the verdict, moved that the same be set aside on the ground that there could not, by any possibility, be a verdict for the defendant; that the plaintiff was entitled at least to nominal damages. This ground, with a specification of certain alleged errors in rulings upon the trial, is now urged for a new trial upon a case. But it was early decided that a verdict will not be set aside merely to give the plaintiff an opportunity to recover nominal damages (*Brantigham* agt. *Foy*, 1 *Johns. Cas.*, 256). *Randall* agt. *Butler* (10 *Wend.*, 119) was an action for libel, where the jury found a verdict for the defendant. The court refused to grant a new trial, although it was a case in which the verdict should have been for the plaintiff, with at least nominal damages (*Van Slyck* agt. *Hogeboom*, 6 *Johns.*, 270; *McCombe* agt. *N. Y. and Erie R. R. Co.*, 20 *N. Y.*, 495–498). I am referred to no case in which the rule, apparently well settled, has been departed from.

I do not think that upon any ground urged I can interfere with the verdict, and the motion for a new trial must be denied.

N. Y. COMMON PLEAS.

THE PEOPLE *ex rel.* KOROTOWSKY agt. ABRAHAM LEIPZIG.

Supplementary proceedings — duties of referees defined.

The duty of a referee appointed under supplementary proceedings is to *take* and not to *make* the examination of the judgment debtor, and if he attempts to do so in an officious manner and partisan spirit he transcends his duty.

Special Term, March, 1877.

IN this action a judgment was obtained in the district court against the defendant, and a transcript of the same was filed in the county clerk's office. An order for the examination of the defendant in supplementary proceedings was issued by Mr. justice VAN HOESEN, directing the same to be had before a referee. On the examination before the referee the judgment debtor appeared attended by counsel. After a number of sittings had been held, for some cause, the referee adjudged the judgment debtor in contempt, and certified the proceedings to the court.

Adams & Lewis, for plaintiff.

Byron W. Cohn, for defendant.

Mr. Cohn, who appeared on this motion for the judgment debtor, claimed that from the moving papers, the examination and the report of the referee, which were on file, it appeared that the examination had been conducted mainly

by the referee. The judgment debtor, in his affidavit, read on the argument, charged the referee with partiality and with having transcended his duties as referee, in that the examination of the judgment debtor was conducted mainly by the referee, and that the referee's actions were characterized by a vindictive spirit to interrogate the witness upon points which were entirely irrelevant. Mr. Cohn then pressed a motion to modify the original order for the examination of the judgment debtor, by striking out the order of reference and to substitute in its place a clause that the examination be continued before this court.

ROBINSON, *J.* — The contempt charged in specific terms against the defendant for failure, on his examination before the referee appointed in proceedings supplementary to execution, to answer precisely and categorically certain questions put to him, does not appear to me to be substantiated, nor do the answers appear to have been made in any spirit of evasion. To the question, "How long after the sale of the business carried on by you, at number 260 Bowery, to Mr. Pincus, did Mr. Pincus sell it to your wife?" the referee's minutes state, he answered, "I cannot state." His response or affidavit to this application is, that he answered, "from one to four weeks;" and the minutes of the referee do not essentially vary, and state, "it might be a week, it might be a month for all I know." I fail to find such evasion in the answers to the further questions as to the time that elapsed between these two sales: "Was it longer than two weeks after you had sold the place to Mr. Pincus that Mr. Pincus sold it to your wife?" A. "It might and it might not." Q. "Was it longer than three weeks?" A. "I don't know." Q. "Was it less than three weeks?" A. "It might and it might not."

The matter certainly was not shown to have been one of precise knowledge on his part, and he expressly said it was not one of recollection. The attempt, therefore, to compel

him to fix the time with exact precision when he said he could not do so, was unjustifiable. Again, it plainly appears that the referee, instead of acting the mere part of one before whom an examination should be conducted by the plaintiff, in a great measure, took upon himself the part of *dominus litis*, or prosecutor, and pressed questions suggested of his own motion to an inquisitorial extent. In my opinion, the duty of a referee appointed under supplementary proceedings, is to *take*, and not to *make*, the examination of the judgment debtor; and if he attempts to do so in an officious manner and partisan spirit he transcends his duty.

A perusal of the referee's minutes of the examination of the defendant Leipzig, cannot fail to disclose that he allowed himself to act as the chief prosecutor of the examination directed to be had before him, and by his own interference induced or prompted much of the difficulty occurring on the hearing before him. I can perceive nothing in the defendant's conduct on the examination to render him justly chargeable with any willful contempt, but much to extenuate any possible irritation he may have displayed.

The motion to punish him for contempt is denied with ten dollars costs to be set off against the judgment.

SUPREME COURT.

FRANCIS E. WALES agt. WILLIAM J. SHERWOOD, impleaded, &c.

Assumption of a mortgage.

When a party by deed assumes the payment of a mortgage, executed by his grantor, he becomes the principal debtor; the mortgagee may enforce the liability.

Special Term, November, 1876.

G. W. Cotterill, for plaintiff.

A. S. Diossy, for defendant.

VAN VORST, *J.* — Phillips, the mortgagor, conveyed the premises to the defendant Sherwood, in consideration of $36,000, of which Sherwood paid cash only $11,250, and assumed and agreed to pay the mortgage as the remaining portion of the consideration-money. The statement in the conveyance which creates this agreement, immediately after the *habendum* clause, is in these words: "Which said mortgage, with the interest thereon from November 30, 1872, the party of the second part hereby assumes and agrees to pay, the same forming a part of the consideration-money hereby expressed." The defendant Sherwood accepted the deed and entered into possession of and enjoyed the premises. The language creating the obligation to pay this mortgage is clear and explicit. It is objected on the part of the defendant Sherwood that he is not liable for any deficiency which may arise on the sale of the mortgaged premises, upon the ground that no agreement in writing has been signed by him wherein or whereby he promised or agreed to pay the bond and mortgage in question, and that there is no privity between him

and the mortgagee. It is true that the defendant, the grantee, did not sign the deed, nor was it necessary that he should. The acceptance of the deed, and his entering into possession of the premises, was enough to make complete his liability for the payment of the mortgage, and for any deficiency arising on the sale. In *The Atlantic Dock Company* agt. *Leavitt* (54 *N. Y.*, 35) it is distinctly held that the acceptance of the deed and the enjoyment of the estate created estops the grantee from denying his covenants, and from denying that the seal attached is his as well as that of the grantor. See, also, *Trotter* agt. *Hughes* (2 *Kern.*, 74), where DENIO, J., says: "The acceptance of a conveyance containing a statement that the grantee is to pay off an incumbrance limits him as effectually as though the deed had been *inter partes*, and had been executed by both grantor and grantee" (*Belmont* agt. *Coman*, 22 *N. Y.*, 438). In a recent case in this court, in this department, at general term (*Cabro* agt. *Davis*, 15 *N. Y.*, 222), it is held, BRADY, J., that when a party by deed assumes the payment of a mortgage executed by his grantor, he becomes the principal debtor. The defendant's obligation, created by his agreement, inures to the benefit of the mortgagee, who may enforce the liability. In *Trotter* agt. *Hughes* (*supra*) it is said, in substance, that the mortgagee may resort to and enforce this liability assumed by the grantee in the deed "by virtue of the doctrine of subrogation in equity, by which the creditor is entitled to use the collateral securities which the debtor has obtained to re-enforce the primary obligation. The mortgagee in such case is looked upon as occupying the position of a surety, while the grantee, having undertaken upon a competent consideration to pay the debt, is regarded as the principal debtor" (*See, also, Burr* agt. *Beers*, 24 *N. Y.*, 178; *Thorp* agt. *Keokuk Coal Co.*, 48 *N. Y.*, 253). Under these repeated and explicit decisions, the liability of the defendant for the deficiency, if any, would seem to be clearly established. There must be judgment for the plaintiff.

SUPREME COURT.

James Halstead agt. Robert Seaman.

Award — of arbitrators — what are insufficient grounds for setting aside.

A court of equity will not set aside an award of arbitrators, for error *either in fact or law*, as to matters within their jurisdiction, and there must be something more than error of judgment, such as misconduct or corruption, or a mistake of law or fact in the nature of a clerical error, and in general to be available, *this must appear on the face of the award or in some paper delivered with it.*

The supreme court *has no general supervisory power over awards of arbitrators*, and where arbitrators keep within their jurisdiction, their awards, in the absence of *corruption or misconduct*, will not be set aside for errors of judgment, either as to the law or to the facts.

The party alleging error must be able to show *from the award itself, that but for the mistake the award would have been different*, and unless restricted by the terms of the submission, arbitrators may disregard strict rules of law and evidence and decide according to their sense of equity.

The merits of an award cannot be reinvestigated, and where corruption or misconduct has not been made out, nothing *dehors* the award can be pleaded or given in evidence, to invalidate it, however unreasonable or unjust it may be.

An arbitrator has some power within his discretion, to determine how much evidence he will receive, but it is his general duty to hear all evidence *material* to the case, which is offered, and if arbitrators refuse to hear evidence *pertinent and material* to the controversy, it is such misconduct as will vitiate the award.

To furnish ground for the setting aside of an award for the refusal of the arbitrators to hear evidence it must be clearly shown that the evidence offered was *pertinent*, *competent* and *material*. It is not enough that the party attacking the award swears that the evidence offered *was material*, to bring it within the rule.

Where, as in this case, both parties were heard, each party giving his written statement of his version of the controversy to the arbitrators, and no witnesses other than the parties were heard, and where by the

terms of the submission it was agreed that "the arbitration should be conducted and decided upon the principle *of fair and honorable dealing between man and man*:"

Held, that under such a submission where each party was heard in his own behalf, the arbitrators were not guilty of *misconduct* in refusing to hear other evidence, but that in such refusal they acted in the exercise of a discretion vested in them, by law and by the submission, and that they have been guilty of no misconduct which should constrain a court of equity to interfere in the award.

Special Term, June, 1876.

THIS action is brought to set aside an award of arbitrators. The following are some of the facts: Matters of difference existing between plaintiff and defendant in relation to what is designated and known in this case as the "Van Eisenberg matter," it was agreed between them that such differences should be submitted to Rufus Park, George W. Elder and John N. Billings, as arbitrators, to arbitrate, award, judge and determine of and concerning the same, and for the furtherance and better carrying out of said agreement and arbitration the parties thereto respectfully executed bonds. By the terms of the submission it was agreed that "the arbitration should be conducted and decided upon the priciple *of fair and honorable dealing between man and man*." The plaintiff alleges in his complaint that the persons so named as arbitrators proceeded to sit and hear the matter, but without being sworn or taking any oath. That, at such hearing, the plaintiff offered and insisted upon producing witnesses and evidence and testimony, and having the same heard and considered by said arbitrators, but they refused to hear any testimony or evidence or listen to any witnesses or to any thing save the statements of plaintiff and defendant. That plaintiff renewed and repeated his request, and finally John N. Billings, one of said arbitrators, proposed to examine witnesses offered by plaintiff, but the other arbitrators refused to hear any witnesses, or receive or consider any evidence or testimony, and thereupon the two, viz., Park and Elder, made and signed

the award. The defendant alleges in his answer that both parties attended before said arbitrators, and were fully heard, neither objecting that the arbitrators were not sworn. The statements of each party were, by consent, taken as evidence, and were submitted in writing, with oral explanations and suggestions, and though the plaintiff spoke of calling witnesses the arbitrators only refused to take testimony, because, upon the facts in respect to which they found that the parties by their own statements substantially agreed, they were able satisfactorily to determine the matters submitted to them according to the terms of the submission, and did, after the parties had been fully heard, make the award, for the setting aside of which this action is brought. Other facts appear in the opinion.

Mr. Scudder, for plaintiff.

Mr. Nash, for defendant.

LAWRENCE, *J.* — There can, I think, be no doubt, from the evidence that Halstead and the arbitrator Billings both requested that witnesses should be sworn, after the statements of the two parties had been read and when it was found that those statements differed so widely from each other. Billings, Patterson and Halstead all testify to this effect, and such discrepancies, as may be apparent, in the evidence of these witnesses, as to the time when such request was made, serve only to confirm the truth of their declarations that such request was made.

The defendant, in his answer, alleges, that the statement of each party was, by consent, taken as evidence, and submitted in writing, with oral explanations and suggestions; and, although the plaintiff spoke of calling witnesses, the arbitrators only refused to take testimony, because upon the facts in respect to which they found that the parties, by their own statements, substantially agreed they were able satisfac-

torily to determine the matters submitted to them according to the terms of the submission, and did, after the parties had been fully heard, make the award, a copy of which is annexed to the complaint. In his evidence the defendant states: "That Sheldon and Brown's names frequently occurred in the reading of Mr. Halstead's statement, and as we went along we would have some argument about it, but there was no such offer made, that I heard, of offering or submitting at all Sheldon and Brown as witnesses; I did not hear any such thing."

In reply to the question: "Did Mr. Halstead ask, at that meeting, to have Sheldon and Brown called in as witnesses?" he answers, "No, sir, he didn't, that I heard at all, *I am quite sure, positive, that it was not done at all.*" The defendant also testifies that there was nothing said about any particular item in his account, and that he never heard of any particular items until "yesterday."

Apart from the fact, that in respect to the item of $500, the defendant is at variance with the arbitrator Park, and with the plaintiff. I think that his answer admits that the plaintiff was desirous of calling witnesses, and that as the answer was verified at a date when the particulars of the arbitration were fresh in his recollection, it is much more likely to have been accurate in its statement of what occurred at the meeting of the arbitrators than his testimony at the trial.

The arbitrator, Mr. Park, thinks there was nothing said about the calling of witnesses, at the first meeting, and is confident that there was nothing said about calling Sheldon and Brown, as witnesses, at that meeting, and afterward he states that the plaintiff did not suggest bringing any witnesses, but upon being asked: "Do you mean that he didn't state, in any manner, that he could bring testimony before you?" he answered, "I think not; I don't remember that he suggested that he could."

The testimony of the defendant and of Mr. Park does not,

in my opinion, overcome the testimony offered on the part of the plaintiff to the effect that the arbitrators were requested by Billings and by the plaintiff to hear evidence.

This case must, therefore, in my view of the evidence, be determined on the assumption that such a request was made; and the question presented, therefore, is whether such refusal is ground for vacating the award.

In the case of *The Morris Run Coal Company* agt. *The Salt Company of Onondaga* (58 *N. Y.*, 667), the court of appeals held, that a court of equity will not set aside an award of arbitrators for error, *either in law or fact*, as to matters within their jurisdiction, and that there must be something more than error of judgment, such as misconduct or corruption, or a mistake of law or fact in the nature of a clerical error; and that, in general, to be available, *this must appear on the face of the award, or in some paper delivered with it.* And in the more recent case of *Fudickar* agt. *The Guardian Mutual Life Ins. Co.* (62 *N. Y.*, 392), it was held, that the supreme court *has no general supervisory power over awards of arbitrators*, and that where arbitrators keep within their jurisdiction, their awards, in the absence of *corruption or misconduct*, will not be set aside for errors of judgment either as to the law or to the facts. It was further held in that case that the party alleging error must be able to show, *from the award itself, that but for the mistake the award would have been different*, and further, that unless restricted by the terms of the submission, arbitrators *may disregard strict rules of law and evidence, and decide according to their sense of equity.* I do not understand the learned counsel for the plaintiff, in this case, to claim that there is any such mistake apparent upon the face of the award as to authorize a court of equity to grant him relief, within the doctrine laid down in the cases just referred to and by the numerous authorities which those cases are designed to follow; but I understand him as contending that the refusal to hear witnesses was in itself *such misconduct* on the part of the

arbitrators, as to require the setting aside of the award. On this point counsel has cited numerous authorities from the English reports, which I have examined. Some of them do not appear to me to sustain the counsel's position, but as the rule which must control this case has been so fully settled, by the courts of our state, I do not deem it essential to notice those authorities specifically, further than to say that the case of *Phipps* agt. *Ingram* (3 *Dowl.*, 669) appears, at the first blush, to be a very strong authority in the plaintiff's favor. The doctrine of the case, as stated in the head note, is as follows: "The refusal of an arbitrator to examine witnesses is sufficient *misconduct* on his part to induce the court to set aside his award, though he may think he has sufficient evidence without them." But upon examining that case it will be found that while Lord ABINGER said, "There is no imputation upon Mr. Stocken's character, but I think he was bound to examine the plaintiff's witnesses," and while Baron PARK added, "There is no misconduct in the bare sense of the word," it distinctly appeared that the plaintiff had produced, at the first meeting, *seven* witnesses, and that the arbitrator, after having inspected the phaeton, which was the subject of the controversy, decided that there was no necessity for calling witnesses, and that he subsequently heard the defendant's witnesses, and rendered his award in the defendant's favor. It was also alleged that the arbitrator lived at the defendant's house, and other circumstances, showing that he had unduly favored the defendant, were stated. I agree that this case shows strange misconduct and gross partiality on the part of the arbitrator, and that the case may well have been rested upon that ground; but I do not see how it could have been held that there was no imputation upon the arbitrator. His conduct seems to have been inexcusable. In the case of *Spettigue* agt. *Carpenter* (3 *P. Wms.*, 361) it appeared that there were several stated accounts between the parties whereby considerable sums were due from the defendant to the plaintiff; but the arbitrator, without any regard to those stated

accounts, made up an account in his own way, bringing in the plaintiff indebted to the defendant twenty-five pounds, and awarding the former to assign over to the latter a mortgage which he had on the other's estate, upon which mutual releases were to be given. The plaintiff, understanding what award the arbitrator was about to make, desired the arbitrator to defer making his award until he should satisfy him as to some things which the arbitrator took against him, though it was within two or three days before the time for making the award was out. The request being denied, the chancellor set aside the award. In that case there were accounts stated which showed that the defendant was indebted to the plaintiff. Being stated accounts, it must be assumed that they had been examined and found correct by both parties (*Lockwood* agt. *Thorne*, 1 *Ker.*, 170). They were, therefore, conclusive between the parties, unless impeached for fraud or mistake. Such fraud or mistake was not alleged, and the fact that the arbitrator, in the face of such accounts, found in favor of defendant, thereby disregarding the accounts, was strong evidence of gross partiality and misconduct on the part of the arbitrator, and that appears to be the true ground on which the decision must be maintained. The elementary writers lay down the rule that an arbitrator has some power within his discretion to determine how much evidence he will receive, but it is his general duty to hear all evidence material to the case which is offered (*Morse on Arb.*, 142, 143). And Russell, in his work on arbitration, says "that declining to receive evidence on any matter is, under ordinary circumstances, a delicate step to take, for the refusal to receive proof where proof is necessary is fatal to the award."

The leading case in this state on this subject seems to be *Van Cortlandt* agt. *Underhill* (17 *Johns.*, 405), in which it was held that if arbitrators refuse "to hear evidence *pertinent and material* to the controversy, it is such misconduct as will vitiate the award in the court of chancery" (*Per* SPENCER, *Ch. J.*, *p.* 408). This case was cited with approval by ANDREWS,

J., in his opinion, in the case of *Fudickar* agt. *The Guardian Mutual Insurance Company* (*supra*). The learned judge says: "If an arbitrator refuses to hear competent evidence on the merits, his award will be set aside" (*citing Van Cortlandt* agt. *Underhill*).

This case, then, appears to turn upon the question whether the evidence offered by the plaintiff was pertinent, competent and material. Precisely what Sheldon and Brown could have proved does not appear. It appears that they were the attorneys for Dr. Von Eisenberg, whose affairs were the cause of this controversy; but I do not understand from the evidence that they knew any thing about the advances made by the defendant, nor of the agreement between the plaintiff and the defendant.

If my apprehension of the testimony is correct, how could the evidence of Sheldon and Brown, even if competent, be pertinent or material. In regard to the alleged objectionable items in the defendant's account, as I understand the testimony, the defendant's objection to and the denial of those items was laid before the arbitrators, and thereupon the defendant was compelled to swear to his account. Sheldon and Brown are not alleged to have known any thing about those items, nor were any other witnesses mentioned by name, or otherwise, who could throw light upon the subject. The suggestion of the plaintiff's counsel that Halstead swears that the evidence *was material* does not seem to bring this case within the rules established by the cases in this state before referred to. It not being made out that Sheldon and Brown's testimony was material or pertinent to the matter in controversy the arbitrators cannot be said to have been guilty of *misconduct* in refusing to receive such testimony, and if there was any error in the defendant's account, the evidence does not establish that any competent or material evidence on that point was offered by the plaintiff beyond his own statement which was laid before the arbitrators, and must be assumed to have been considered by them. It seems to be

the settled doctrine in this state that the merits of an award cannot be reinvestigated, and where corruption or misconduct has not been made out, nothing *dehors* the award can be pleaded or given in evidence to invalidate it, however unreasonable or unjust it may be (*Perkins* agt. *Giles*, 53 *Barb.*, 342; *Todd* agt. *Barlow*, 2 *J. Ch.*, 551; *Herrick* agt. *Blair*, 1 *id.*, 102; *Perkins* agt. *Giles*, 50 *N. Y.*, 228). In the last cited case the court of appeals held that "where no charge of corruption or of bad faith in the arbitrators is made, mere errors of judgment are no grounds for setting aside an award, and neither party will be allowed to prove for that purpose that the arbitrators decided wrong *as to the law or the facts.*" Now, in this case, both the parties were heard. Each party gave his written statement of his version of the controversy to the arbitrators. No witnesses other than the parties were heard, and by the very terms of the submission it was agreed that "the arbitration shall be conducted and decided upon the principle *of fair and honorable dealing between man and man.* Under such a submission I am not prepared to say that where each party was heard in his own behalf the arbitrators were guilty of misconduct, in refusing to hear other evidence, and the case differs essentially in these respects from the English cases referred to by counsel, upon which I have above commented. In the case reported in the third of *Dowling* the witnesses of one party were heard, and not those of the other, and in the case in *Peere Williams' Reports* (*vol.* 3), the arbitrators disregarded accounts stated, found against the plaintiff in the face of those accounts, and refused to hear the plaintiff in regard to the same, upon request made before award found. In neither of these cases were the parties accorded such a hearing as the parties obtained in this case, and upon all the testimony it seems to me that the arbitrators, in refusing to hear other testimony, acted in the exercise of a discretion, vested in them by law and by the submission, and that they have been guilty of no

conduct which should constrain a court of equity to interfere with the award which they have made.

Finally, the language of chancellor KENT, in *Herrick* agt. *Blair* (1 *Johns. Ch.*, 102), seems appropriate to this case: "The arbitrators are judges of the parties' own choosing, their proceedings and award are treated with great liberality, and even a mistake upon a doubtful point often will not open an award. These principles have been declared and asserted in a series of decisions, all going to the same point, and containing a weight of authority not to be resisted" (*citing numerous cases*).

And PECKHAM, J., in delivering the opinion of the court in *Perkins* agt. *Giles*, says: "When lord chancellor HARDWICKE delivered the opinion in *Lingood* agt. *Eade* (2 *Atkyns*, 501), it was difficult to sustain an award in the court, no matter how carefully made. 'But the rule in their construction has since greatly changed. *They are now favored in law.* Presumptions are made to sustain them; courts of equity enforce them like any other contract of the parties when it is necessary to resort to such courts. They correct mere mistakes in awards not of a judicial nature, and then enforce them'" (50 *N. Y.*, 235).

To recapitulate:

I. I find that there was no misconduct on the part of the arbitrators in not receiving further evidence, in view of the terms of the submission, and of the fact that both parties had been heard.

II. That there was nothing to show that the evidence of Sheldon and Brown *was material, or pertinent to the matters in controversy.*

III. That no corruption or partiality or fraud on the part of the arbitrators was shown by the evidence on the trial.

IV. That on the face of the award there is no error.

V. That even conceding that there were items in the account which the arbitrators should not have allowed, as against Mr. Halstead, it nowhere appears from the award

itself that but for such alleged error the award *would or should have been different.*

As the defendant has pleaded the award in his answer as a counter-claim, I am of opinion that he is entitled to judgment for the amount thereof, with interest thereon, and for the costs of this action. Findings may be settled on five days' notice.

U. S. DISTRICT COURT.

In the Matter of ISIDOR GOLDSTEIN AND ABRAHAM GOLDSTEIN, bankrupts.

Stilwell act — operations of, in its relations with the United States bankrupt law.

The provisions of the Stilwell act are in direct conflict with those of the bankrupt law, and inasmuch as a bankrupt cannot comply with the requirements of the Stilwell act, he ought not to be subjected to its penalties.

After an adjudication in bankruptcy, the bankrupt acquires an undeniable claim to the protection of the United States court, and where a state court, as in this case, attempts to interfere by the issuance of a "Stilwell warrant," causing the arrest of the bankrupt, an injunction will issue enjoining the state courts from prosecuting under said warrant.

Southern District of New York, in bankruptcy.

ON December 27, 1876, a number of the creditors of Goldstein & Brother (including Haines, Bacon & Co.), filed a petition praying for the adjudication of Goldstein & Brother in bankruptcy. On January 13, 1877, they were adjudicated by default and a provisional warrant was issued to the United States marshal. On February 2, 1877, Haines, Bacon & Co. commenced an action in the supreme court of the state of New York, against Goldstein & Brother, to recover the sum of $1,056.10, being the same claim proven by them in the bankruptcy proceedings. In said action, Haines, Bacon & Co. applied for and obtained from judge DONOHUE, upon the ground of fraudulent representations and concealment of property, a "Stilwell" warrant under the act of April 26, 1831, and on February 2, 1877, the Goldsteins were arrested thereunder and held to bail. Then the present application was

made to judge BLATCHFORD, sitting as United States district court judge in bankruptcy, for a perpetual injunction prohibiting the prosecution of said action and "Stilwell" warrant in the New York supreme court.

David Leventritt, counsel for the Goldsteins, in support of the application.

First. The right to prosecute the suit in question is absolutely denied under section 5106 of the Revised Statutes of the United States. The fact of the proof of the debt in bankruptcy is most unquestionable evidence that it is so provable (*In re Rosenberg*, 2 *B. R.*, 236; *In re Metcalf*, 1 *id.*, 201).

Second. The adjudication in bankruptcy having been already had, the bankrupts have clearly acquired an undeniable claim to the protection of the United States court (*Maxwell and ano.* agt. *Faxon and ano.*, 4 *B. R.*, 210).

Third. As the "Stilwell" warrant is auxiliary to the action at law, the restraint of the latter necessarily involves the prohibition of the former. And as it is already established that the action cannot be maintained, every branch of the suit must terminate with it. The warrant can have no existence — has no life — without the suit in which it originated.

Fourth. The language of section 5107 of the Revised Statutes of the United States: "The bankrupt shall not be liable during the pendency of proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him," is sufficiently broad to cover the case at bar and entitles the bankrupts to the relief sought.

Fifth. An arrest under the "Stilwell act" and all proceedings thereunder are *not* for the *punishment* of fraudulent debtors, but the enforcement of payment by resort to its stringent measures (*Goodwin* agt. *Sharky*, 5 *Abb.* [*N. S.*] 64; *In the Matter of Adroit*, 2 *Daly*, 28; *chap.* 300, *Laws* 1831, *secs.* 3–10).

Sixth. Even if the "Stilwell act" is criminal in its ten-

dency, the measure of the punishment to be inflicted is limited to the payment of the demand involved in the litigation, and as such payment *ipso facto* terminates the imprisonment, the primary object of the act can only be the collection of the creditor's claim, and therefore proceedings under the act are in direct conflict with the bankrupt law (*Goodwin* agt. *Sharkey*, 3 *B. R.*, 558, *or* 5 *Abb. N. S.*, 64).

Seventh. The "Stilwell act" prescribes the making of a general assignment for the benefit of creditors and its prosecution to a final, successful issue as one method of limiting the penalties, which ensue upon conviction. Such an assignment is absolutely, *ab initio*, void under the bankrupt law, and therefore a bankrupt cannot avail himself of this means of relief. Can a harsh, persistent creditor "close the door" against escape by procuring an adjudication in bankruptcy, and then, at his option, adopt a proceeding, which by his own act, he has rendered the bankrupt powerless to avoid?

Eighth. Payment of the debt, as required by the act of 1831, cannot be performed by the bankrupt, as the provisional warrant, issued under section 5028 of the Revised Statutes of the United States, compels a surrender of all the bankrupt's effects, thus placing him in a position of compulsory financial inability to comply with the "payment" provisions of the Stilwell act. Previously *legally* debarred from fulfilling its requirements, and yet subject to its penalties, is a proposition obnoxious to both law and justice.

The supreme court should be perpetually restrained from the further prosecution of the action instituted and from the proceeding against the bankrupts under the Stilwell warrant.

Richard S. Newcombe, of counsel for Haines, Bacon & Co., opposed. The bankrupt act is not intended to be used as a shield for the protection of criminals, for the protection of persons charged with a criminal act, nor for the purpose of protecting debtors from the consequences of frauds perpetrated by debtors, as provided for by the state laws. Under

the twenty-sixth section of the act to abolish imprisonment for debt, section 39 of article 10, title 1, part 2, chapter 5 of the sixth edition of the Revised Statutes, it is provided that the acts charged against the defendants shall be regarded and treated as a misdemeanor. The proceeding now sought to be enjoined is not a proceeding for the collection of money. It is a proceeding to punish fraudulent debtors. In short, it is a criminal proceeding. The authority to issue injunctions possessed by the bankrupt court is *auxiliary* to the jurisdiction conferred upon it by statute for "the *collection* of all the assets of the bankrupt," or "the *marshalling* and *disposition* of the *different* funds and assets" (*Sec.* 4972). The Stilwell act, in its operation, has none of these purposes in view, and the state court, in entertaining proceedings under said act, exercises its jurisdiction without any conflict whatever with the bankrupt act. As truly expressed in its title, that act has for an object the *abolition* of *imprisonment* and the *punishment* of *fraudulent debtors*. Not the *collection* of the debtor's *property* or estate, *not* the distribution of that estate, *not* the discharge of the debtor from his debts (*Re Andriot*, 2 *Daly*, 28). By section 5106 the court is authorized to enjoin creditors from prosecuting their suits until the question of discharge is determined; that is to say, the court may issue a temporary injunction which shall continue in force until the debtor has had opportunity to plead his discharge from the debt sued on, and so defeat the suit. But, upon the facts in this case, such plea can never be interposed. The debt here sued upon is not provable and not dischargeable, and the reason for issuing an injunction in ordinary cases does not and can never exist here. On determining this motion the court must also pass upon 5107, which declares that "no bankrupt shall be liable during the pendency of the proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." The debt, the foundation of these proceedings, is one of the

class excepted from the operation of this section. Here the affidavits and papers on which the Stilwell warrant issued show conclusively that the debt is not a dischargeable one, and this court cannot try the question of the truth or falsity of the statements contained in these papers (*Re I. H. Kimball*, 2 *B. R.*; *Re Valk*, 3 *R. R.*, 278). The proceeding which will be enjoined is a proceeding to reach the estate of the bankrupts, and that is the only proceeding which the bankrupt court will enjoin, *but will not enjoin the punishment of the debtors for fraud* (*Penny* agt. *Taylor*, *N. B. R.*, 204). The proceeding in question is one to punish the defendants as fraudulent debtors. The district court will exercise only the same powers to restrain judgments at law against a bankrupt that a state court of equity would have over such creditors if the debtor were not a bankrupt (*Fowler*, *Assignee*, agt. *Dillonp*, 308, *vol.* 12, *Nat. B. R.*). *Goodwin* agt. *Sharkey* differs from this case as presented in the following particulars. There the warrant was obtained upon the ground of a fraudulent removal of property. The essential difference here is, the defendants are charged with having fraudulently contracted the debt. Sharkey had been adjudicated bankrupt and an order to that effect entered. An assignee had been elected and a discharge applied for. The motion papers in this proceeding alleges the filing of a petition and adjudication; but no order to that effect having been entered, strictly there is no adjudication, but as a further answer to this case I cite: *Lynde* agt. *Montgomery* (15 *Wend.*, 461); see, also, *Re Androit*, 2 *Daly*, 28–39, which both hold that the act in question is to punish fraudulent debtors, and not for the purpose of procuring an assignment of his property; for if the debtor had fraudulently disposed of it, then the assignment would convey nothing. Under *Re Wardell* (1 *N. Y.*, 144) and *Re Bancker* (5 *id.*, 156), if the debtors show in the proceedings in the state court that they have transferred to their assignee in bankruptcy all of their property, including that with which they are charged with having fraudulently

disposed of, they would be entitled to a discharge from the state court, so that really there is not the slightest conflict in the two proceedings. The nearest case in point that I have found is that of Henry Jacoby (1 *Nat. Bk. R.*, 118), where a reference was ordered to ascertain whether the action was founded on a debt created by the fraud of the bankrupt, and in the mean time in the state court proceedings were stayed except such as related exclusively to holding Jacoby in custody, &c., but in this case a reference is unnecessary, as the fraud is admitted. The judge of this court in *Re Louis Glaser* (1 *Nat. Bk.*, 336) closely follows the decision by him rendered in *Re Jacoby*, using, among others, the following language: "It follows, therefore, that this court is competent to grant to the bankrupt the relief sought by him, provided his arrest was founded on a debt from which his discharge in bankruptcy would release him. It is a disputed question of fact which cannot be decided on *ex parte* affidavits, whether the debt in this case was contracted by the fraud of the bankrupt, and is, therefore, one from which his discharge in bankruptcy would not release him;" but in this case there is no dispute but that the debt was fraudulently contracted, consequently no question arises upon that point, and no reference is necessary.

In *Re Devoe* (2 *N. B. R.*, 27) judge LOWELL, not differing from the two decisions above cited, drew certain nice distinctions, which are applicable in this present case, holding that the state court action being founded on fraud, the bankruptcy court would leave that question to be determined by the state courts.

This court, shortly after the case of Devoe, again passed upon similar questions (*Re Kimball*, 2 *N. B. R.*, 204; *affirmed*, *id.*, 354), there holding, that where it appears by inspection of the proceedings in the state court, on which the arrest was made, that the arrest was founded by the state court on a claim which appears on the face of such proceedings to

be one of damages for fraud, the district court is concluded and cannot inquire whether such claim is well or ill founded.

The state court in this case "has passed upon the question whether by the state laws the debtor was liable to arrest."

This arrest was granted upon the ground that the debtors "fraudulently contracted the said debt, to recover which the said action is brought" (*See application for warrant*).

Proving a debt in bankruptcy, or joining in a petition, does not operate as against Haines, Bacon & Co. (*Re Rosenberg*, 2 *B. R.* 81, *upheld by Mr. justice* NELSON *in Re Robinson*, 2 *N. B. R.*, 108, *and in Re Migel*, 2 *U. B. R.*). Mr. justice BLATCHFORD, at pages 482 and 483, uses the following emphatic language upon the question now presented:

"The proceedings in the supreme court in this case, consisting of the order of arrest and the affidavit on which it was made, although such order was, as is the practice, made *ex parte*, must, for the purposes of this application, be considered as an adjudication by the state court that the debt was created by the fraud of the bankrupts."

Section 21 of the act was in *Re Rosenberg* (2 *B. R.* 81), held not to include such debts as by section 33 are not dischargeable, and a debt contracted by fraud is not dischargeable.

The remedy open to the debtors is most simple and easy the moment it is inquired into, if they are improperly charged in the state court; there they have a complete remedy — go there and disprove the charges made against them and not apply to this court in this summary manner; if there is any honesty in them the state court is the court at which to prove it; and the state court having adjudicated that they have been guilty of the fraud charged, this court will not interfere to relieve the debtors from the consequences of their wrong.

BLATCHFORD, *J.*, after hearing the above arguments, issued the following injunction order. No opinion written.

At a stated term of the district court of the United States

of America for the southern district of New York, held at the United States court rooms, in the city of New York, on Monday, the 5th day of March, in the year of our Lord 1877.

Present — Hon. SAMUEL BLATCHFORD, *district judge.*

IN THE MATTER OF ISIDOR GOLDSTEIN AND ABRAHAM GOLDSTEIN, bankrupts. } No. 5725.

A motion having been made by David Leventritt, counsel for the above named bankrupts, for a perpetual injunction enjoining and restraining Richard R. Haines, Francis M. Bacon, Benjamin R. Haines and William Harrington, composing and comprising the firm of Haines, Bacon & Co., from prosecuting and attempting to prosecute a certain action and proceeding instituted by them against the above named bankrupts in the supreme court of the state of New York county of New York, and upon reading and filing notice of motion thereof, the petition of said bankrupts and copies of the papers in said action and proceeding, and after hearing David Leventritt, counsel for said bankrupts, in support of said motion, and Richard S. Newcombe, Esq., counsel for said creditors, in opposition thereto, it is ordered that the said Richard R. Haines, Francis M. Bacon, Benjamin R. Haines and William Harrington, composing the firm of Haines, Bacon & Co., they and each of them, their and each of their agents, servants and attorneys, are hereby restrained, prohibited and enjoined from further prosecuting a certain action instituted by them in the supreme court of the state of New York, on February 2, 1877, for the recovery of the sum of $1,050.10 against the above named bankrupts; and they and each of them, their and each of their agents, servants and attorneys are hereby restrained, prohibited and enjoined from further prosecuting a certain proceeding heretofore adopted by them against said bankrupts, under an act, as "An act to abolish imprisonment for debt, and to punish

fraudulent debtors," passed April 26, 1831, and the acts amending the same, and under which proceeding said bankrupts were arrested on the 2d day of February, 1877. Said action and proceeding, and each of them, are hereby stayed until the final determination of this court upon the question of the discharge of said bankrupts, but this order is not to operate to discharge said bankrupts from said arrest, or to affect the order of arrest.

Witness the Hon. SAMUEL BLATCHFORD, judge of the said [L. S.] court, and the seal thereof, at the city of New York, in said district, this 5th day of March, A. D. 1877.

N. Y. SUPERIOR COURT.

EDWARD LYNCH, survivor, etc., respondent, agt. JOHN PYNE, appellant.

Conflicting evidence.

Where it becomes necessary for the court to pass upon the weight of conflicting evidence, it will consider letters written by a party, and acts performed by him contradictory of his oath, as rendering such oath of no consideration.

General Term, December, 1876.

APPEAL from an order denying the defendant's motion for a new trial on the judge's minutes.

G. M. Curtis, for appellant.

M. J. N. McCaffery, for respondent.

CURTIS, *C. J.*—The plaintiff sues to recover for work claimed to have been performed at the request of the defendant, and for plants and flowers furnished to the defendant between January 3, 1870, and April 13, 1872.

The main question presented by the case is, whether the work was performed for the defendant, and the flowers and plants furnished to him or his wife, at his request. The defendant and his wife lived with Mr. Cambreleng during this period, in the house owned by the latter, and to which a conservatory and a garden were attached. Mr. Cambreleng, who was the father of the defendant's wife, died June 24, 1872.

The plaintiff testifies that sometimes the defendant and his

wife, and sometimes one or the other, ordered the flowers and plants in question, and that he charged them on his books to the defendant's wife and sent the bill to him; and that he called on the defendant with the bill on several occasions, but that he never promised to pay him personally.

The plaintiff called a witness, who testified that he called on the defendant many times in relation to the bill, when he would sometimes say, "I can't do any thing to-day," or would answer affirmatively when asked by witness if he should call again. But as the defendant was at this time the executor of Mr. Cambreleng's estate, it may have been that he was answering in that capacity, especially as the plaintiff was seeking to collect this same claim from that estate, and to its liability for which no question was raised. It appears that this estate was insolvent.

The defendant testified that he did not order these plants or flowers, and that the only transaction he ever had with the plaintiff's firm was the purchase of a bouquet fifteen years previous, which he paid for; that he never authorized the trusting of his wife, or knew of it; that no bill was made out to her until after her father's death; and that she attended to her father's commissions — he being advanced in years — such as making purchases for the house, and that he had heard him direct her to go and order plants, but that he never knew her to do so, except for her father. The defendant also testified that no bill was ever made out against him, and that when he first received the bill made out against his wife he notified the plaintiff that it was improperly made out against her, and that it should be made out against Mr. Cambreleng.

In examining the testimony of the plaintiff (for it will be observed that the case rests chiefly upon the testimony of the two parties) there are some circumstances that do not tend to sustain the statements of the plaintiff at the trial. For instance, the defendant, on the 23d day of June, 1873, wrote plaintiff's firm the following note:

NEW YORK, *June* 23, 1873.

Messrs. BRIDGEMAN & Co.:

DEAR SIRS. — I am not aware that any of the articles in your bill were ordered for me or on my credit. Your bills have always been made out, rendered to, and paid by Mr. Stephen Cambreleng, and were for work done in, and plants furnished to his garden and conservatory, No. 35 Great Jones street, which plants were appraised as part of his estate. There was a bill for these very articles rendered in Mr. Cambreleng's lifetime, made out to him, and the only account ever kept by you was with him. I shall resist firmly any attempt to make me liable for any goods or labor furnished, or alleged to have been furnished by you to Mr. Cambreleng, or for his house and garden. Your claim, if any, is against Mr. Cambreleng's estate, and has already been made against his estate.

Yours truly.

J. PYNE.

In answer to this note the case admits that the plaintiff sent the following letter:

NEW YORK, *June* 26, 1873.

JOHN PYNE, Esq.:

DEAR SIR. — You have mistaken the tenor of our note in supposing that we expected to make you liable for the bill. Not at all; the bill is, as you say, against the estate of Mr. Stephen Cambreleng, and the reason why we wrote and sent to you was for the reason that, knowing you to be one of the executors, you might be able to satisfy us in regard to the payment, as being very short at present, and having waited so long, we thought that probably the estate was in such a condition now as to admit of the payment of the bill. We hope you will consider us right in this matter, and, as soon as the estate will be in a condition for payment, notify us, and you will greatly oblige,

Yours respectfully.

BRIDGEMAN & CO.

This last communication appears to be an implicit disavowal of any claim against the defendant personally for the bill, and was written at a time when the facts were fresher than at the trial in the memory of the plaintiffs. This seems to bring the case within the principle that where a party's oath is flatly contradicted by his own letters, written long previous to the commencement of the action, it is entitled to no consideration (*Boyd* agt. *Colt*, 20 *How. Pr.*, 384).

The next circumstance affecting the plaintiff's testimony arises from the affidavits made by him in the usual form, September 1, 1873 (two months and more after writing the last letter), to substantiate his claims against the estate of Mrs. Cambreleng.

By these he confirms under oath his statement in the letter that this bill in controversy was against the estate of Mr. Cambreleng. The plaintiff stated at the trial that he knew the claim was against Mr. Pyne, and believed he had no claim against Mr. Cambreleng — none whatever — but that he made the affidavits at the defendant's request, and that he took the latter to be an honorable man, and that on his statement that he would get some money he felt justified in making the affidavit.

It is probably not the first time that a claim has been sworn to and presented against the estate of a deceased person from that motive, but I am not aware that any court has held it a justification for a knowingly false affidavit. There are some other features in the case that strengthen the defendant's testimony that the bill was Mr. Cambreleng's, besides the letter and affidavits of the plaintiff. It is conceded that in July, 1871, Mr. Cambreleng's note, at ninety days, for $220.90, being for part of this bill, was taken by the plaintiff and subsequently protested.

Plaintiff's firm had attended to Mr. Cambreleng's garden, and supplied plants for his house and conservatory for a long term of years before the bills in question were incurred, and these latter were originally made out to him. No charge

appeared on the plaintiff's books against the defendant personally.

The case presented is one of those where the court must pass upon the weight of conflicting evidence (*Finch* agt. *Parker*, 49 *N. Y.*, 1). The result of the examination is a conviction that the verdict of the jury cannot be sustained. Under such circumstances the judgment must be reversed and a new trial ordered, with costs to abide the event.

SUPREME COURT.

THE PEOPLE *ex rel.* WILLIAM A. SEAVER agt. ANDREW H. GREEN, comptroller of the city of New York.

Mandamus — to compel the payment to relator the sum allowed by the supreme court for services as commissioner in acquiring title to lands.

Chapter 488 of Laws of 1862, page 966, entitled "An act to prevent fraud in the opening and laying out of streets and avenues in the city of New York," does not apply to proceedings of this character.

The special purpose of the proceedings in this matter was to acquire title to the lands, within certain specified limits, for a boulevard or public drive, to be adapted and set apart for purposes of ornament, exercise and amusement. They were not carried on to open and lay out a street or avenue in the sense in which these words are used in the statute of 1862. The compensation of the commissioners is, therefore, not limited to thirty cents per foot for the lineal extent of the avenue opened as provided in the statute above referred to.

At Special Term, September, 1873.

The following affidavit sets forth the facts necessary to the proper understanding of the case:

CITY AND COUNTY OF NEW YORK, *ss.:*

William A. Seaver, of the city of New York, being duly sworn, says: That, on or about the 17th day of October, 1872, this deponent, William C. Traphagen and John McClave, were, by a rule or order, duly made and entered at a special term of the supreme court of the state of New York, duly appointed commissioners of estimate and assessment, in a matter then pending in said court, entitled: "In the matter of the application of the department of public parks, and the

department of public works, for and in behalf of the mayor, aldermen and commonalty of the city of New York, relative to acquiring title for the use of the public to all the lands required for laying out a public road or drive, northwardly from the southerly line of One Hundred and Fifty-fifth street to the intersection of the Kingsbridge road with Inwood street, as laid out by resolution of the commissioners of the Central park, in the city of New York."

That thereafter and pursuant thereto, the said William C. Traphagen and John McClave and this deponent, took and duly filed the oath of office, and entered upon the discharge of their duties as such commissioners.

That thereafter such proceedings were duly had in said matter, that the commissioners aforesaid duly made their report to the supreme court, in and by which were specified the sums awarded by the said commissioners to the parties whose lands were taken and acquired in the said proceedings, and for costs, charges and expenses hereinafter mentioned, and also the sums assessed by the said commissioners, upon the several lots or parcels of land benefited by the said improvements, and upon the mayor, aldermen and commonalty of the city of New York, and said report was, in all respects, duly confirmed by the said supreme court on or about the 3d day of June, 1873, and duly filed and now stands unreversed, and not in any respect modified.

That, prior to the making of said report, the costs, charges and expenses, incurred by reason of the proceedings in said matter, were presented for taxation to one of the justices of the said supreme court, pursuant to due notice in that behalf, and were by said justice duly taxed and allowed, as appears by the record thereof duly filed and now in the hands of the comptroller of the city of New York, and among the said costs, charges and expenses was taxed and allowed to this deponent, for his fee and services as commissioner in said proceedings, the sum of $5,000; and said costs, charges and expenses so taxed and allowed were duly set

forth by the said commissioners, in their said report before the confirmation thereof, and payment of said costs, charges and expenses duly provided for in said report by assessment; that no part of the said moneys has been paid and the full amount thereof is due and owing to this deponent. That very large sums of money, and much more than sufficient to pay the costs and expenses incurred by reason of the proceedings in said matter, have been duly collected and paid over to the finance department of the city of New York, as deponent is informed and believes. And the said comptroller has, in his hands or under his control, sufficient funds applicable to payment of said costs, charges and expenses. And this deponent has demanded of the comptroller of the city of New York the payment of the said sums of money so awarded to him as his fees as such commissioner. But said comptroller refuses and neglects to make payment of the same, or to draw or cause to be drawn the proper warrant in that behalf on the chamberlain of the city of New York for the said sum of money so owing to deponent, or for any part thereof. That prior to the 1st day of January, 1872, Andrew H. Green has held and now holds the office of comptroller of said city.

Wherefore, this deponent prays that an order may be made directing the said comptroller to show cause why a peremptory writ of mandamus should not issue out of and under the seal of this court, directed to Andrew H. Green, comptroller of the city of New York, and requiring and commanding him to forthwith pay over to this deponent the said sum of $5,000 and any interest which may have accrued thereon in favor of deponent, as and for his fees for services as commissioner as aforesaid, in such form and substance as to the court shall seem meet and proper, and why this deponent should not have such other or further relief in the premises as to the court may seem just.

WM. A. SEAVER.

A. R. Lawrence, jr., for relator.

E. Delafield Smith, counsel to the corporation.

FANCHER, *J.* — William C. Traphagen, John McClave and William A. Seaver, severally apply for writs of mandamus against the comptroller, requiring him to pay the allowances made to the relators, as commissioners in the proceedings to open the public drive from One Hundrd and Fifty-fifth street to the Kingsbridge road. On the 3d of June, 1873, the report of the commissioners was confirmed, and the costs and expenses were taxed. Among the items thus allowed were the charges of the relators, which were taxed at $5,000 each.

Considering the extent and character of the services of the relators, the items allowed them were reasonable and much less than has been generally allowed for similar services.

Their work was performed with expedition, and to the apparent satisfaction of all parties interested.

But the comptroller contends that chapter 483, laws of 1862, page 966, limits the compensation of the commissioners to thirty cents per foot for the lineal extent of the avenue opened.

The phraseology of the statute, as to the opening of streets or avenues, seems to support the views of the comptroller.

The extent of this boulevard or public drive was 15,238.79 feet, which, at thirty cents per foot, would make the total compensation $4,571.61, or $1,527.01 to each of the commissioners. This would not be an adequate compensation to the commissioners. The counsel for the relators contends that the statute of 1862 is not applicable to the case of an opening of a street or avenue which was authorized by the legislature, but only to a street or avenue opened by the common council. *In the Matter of the Widening of Broadway*, this precise question was considered at special term by Mr. justice GILBERT. He came to the conclusion that the act of 1862 does not refer to street proceedings originating in the legislature, but was intended to apply only to proceedings which

originated in the common council. The learned justice has not supported his conclusion by any reasoning, and it is difficult, on reading the statute, to perceive what application the statute has to street or avenue proceedings initiated by the common council, which would not equally be the case in such proceedings initiated by an act of the legislature. There is no limitation in the words of the statute. Its title is "An act to prevent fraud in the opening and laying out of streets and avenues in the city of New York," and a chief purpose of its provisions is to reduce and limit the expenses of proceedings in such cases.

But I am not called upon to determine on these motions whether the decision of Mr. Justice GILBERT, in the Broadway case was correct or not, and I disclaim any intention now of doing so.

As it was a special term decision, it could only be appropriately reversed at the general term.

The proceedings in this matter were initiated by the joint application of the department of public parks and the department of public works, for and in behalf of the mayor, aldermen and commonalty of the city of New York, and the proceedings were authorized by an act of the legislature. So far, all proceedings initiated by the common council are authorized by an act or by acts of the legislature.

The common council must find their authority for the proceedings in the statutes of the state. But these proceedings were not carried on to open or lay out a street or avenue. It might as well be said the purpose was to open a highway. No one would claim that the general laws of highways apply to the proceedings. The special purpose of the proceedings in this matter was to acquire title to the lands within certain specified limits, for the laying out of a road or public drive, northward from One Hundred and Fifty-fifth street to the intersection of the Kingsbridge road with a street called Inwood street.

Such a road or public drive is not technically a street or

avenue. There are roads or public drives through and beyond the Central park. They are not strictly streets or avenues. The word "drive," employed as a noun, has been lately extended beyond its former meaning, which only signified an excursion in a carriage; so the word "boulevard," which originally indicated a bulwark or rampart, and was afterward applied to a public walk or road on the site of a demolished fortification, is now employed in the same sense as public drive.

A park is a piece of ground adapted and set apart for purposes of ornament, exercise and amusement. It is not a street or road, though carriages may pass through it.

So a boulevard or public drive is adapted and set apart for purposes of ornament, exercise and amusement. It is not technically a street, avenue or highway, though a carriage-way over it is a chief feature.

I think, therefore, that the statute of 1862 does not apply to the proceedings in this matter and that as the allowances made to the commissioners is reasonable and proper, the motions for mandamus made by the relator should be granted, with ten dollars costs in each case.

The above decision was affirmed by the general term, October, 1873.

INGRAHAM, P. J., BRADY and DANIELS, JJ. No opinion rendered.

N. Y. COMMON PLEAS.

MICHAEL W. DIVINE, administrator, &c., agt. WILLIAM BUTLER DUNCAN, administrator, &c., impleaded.

Supplemental complaint — right to amend — joinder of parties.

A supplemental complaint is a pleading, and as such is amendable once, as of course, in pursuance of section 172 of the Code. A new cause of action can be set up as well in an amended pleading as in an original.

The representatives of a deceased defendant may be joined with a surviving defendant in an action upon a joint liability where the insolvency of the surviving partner is averred.

Special Term, March, 1877.

LARREMORE, *J.*— Charles R. Carroll, in 1867, brought suit against Noah L. Wilson, David Gibson and Wm. L. Roelofson, composing the firm of Wilson, Gibson & Co., to recover upon a joint liability for the purchase and sale of cotton. Carroll had purchased and paid $50,000 for an interest, and was to share in the profits and losses of the transaction. He avers that large quantities of cotton had been bought and sold, and prays for an accounting in the premises, and for judgment for the amount found due him. Defendants answered, admitting plaintiff's interest, their readiness to account, and pleading non-joinder of parties.

The defendant Roelofson died, leaving a will appointing Thomas C. T. Buckley, his executor, who also died. Duncan, one of the present defendants, was duly appointed administrator with the will annexed. The plaintiff died in 1874, and Divine, the present plaintiff, was duly appointed administrator of his estate, who served a supplemental complaint in

revivor as against Duncan as administrator. A demurrer was interposed by him, which was noticed for argument. After service of such notice, and within twenty days after the service of such complaint, the plaintiff served an amended supplemental complaint, changing the cause of action by leaving out the name of the defendant Wilson, alleging his insolvency and death, the insolvency of the defendant Gibson, and praying judgment against Duncan as such administrator, and against Gibson, and that the action be revived. The amended supplemental complaint was returned with a notice that it was unauthorized, as it set up a new cause of action, and was not an amendment. This motion was then made to compel its acceptance and stay all proceedings on the argument of the demurrer.

The Code provides (*sec.* 121) that no action shall abate by the death of a party, if the cause of action survive. In such case, the court, on motion at any time within one year thereafter, or afterward on a supplemental complaint, may allow the action to be continued by or against the representatives of the party deceased. By the section above referred to, a supplemental complaint, a complaint for revivor and supplement, and for mere revivor, are all placed upon the same footing. In this case the cause of action survived, and the proceedings had by the present plaintiff for a revival as against the surviving defendants were authorized and legal. This the defendant Duncan concedes by accepting service of the supplemental complaint and demurring thereto. By the service and return of the amended supplemental complaint and the present application two questions are presented for adjudication:

First. The right to amend the supplemental complaint, of course, in pursuance of section 172, and set up a new cause of action.

Second. The right to join the representatives of a deceased defendant with a surviving defendant in an action upon a joint liability.

First. The supplemental complaint is a pleading, and as such amendable once as of course (*Goddard* agt. *Benson*, 15 *Abb. Pr.*, 191), and the cases of *Brown* agt. *Leigh* (49 *N. Y.*, 78) and *McQueen* agt. *Babcock* (3 *Keyes*, 428) hold that a new cause of action can be set up as well in an amended pleading as in an original. To the same effect are *Spencer* agt. *Tooker* (12 *Abb.*, 353); *Fieldin* agt. *Casselli* (16 *id.*, 289).

In the more recent case of *Robertson* agt. *Bennett* (*Daily Register*, *February* 1), in the superior court, it was decided by judge SPEIR that an answer might be served as of course as an amendment to a demurrer.

In face of these authorities, I must hold that the supplemental complaint was amendable.

Second. Is Duncan, as the administrator of the deceased defendant Roelofson, properly joined as a party with the surviving defendant Gibson?

If this were an action at law on a joint liability, Duncan would not be a proper party, and the estate in his hands could only be reached by a suit in equity after all legal remedies against the surviving partner had been exhausted (*Richter* agt. *Poppenhausen*, 42 *N. Y.*, 373; *Masten* agt. *Blackwell*, 15 *id.* [*Sup. Ct. Rep.*], 313). But this action is on the equity side of the court, and among the averments by way of supplement is that of the insolvency of Gibson, the surviving partner. This is not absolutely denied by the opposing affidavit, the denial being as to the insolvency of the firm of which he was a member.

In *Voorhis* agt. *Child's Executor* (17 *N. Y.*, 354), the doctrine is affirmed that in any action, either at law or in equity, against the representatives of a deceased partner, the insolvency of a surviving partner is an essential fact to recovery; but the court reserved the question whether such fact would justify a joint action against the survivors and the representatives of the deceased partner. In *Van Riper* agt. *Poppenhausen* (43 *N. Y.*, 68) such an action was sustained by reason of the established fact that the surviving partner

was wholly insolvent, although the remedy at law against him had not been exhausted.

The facts alleged, if proved, would sustain a new action against Duncan, and the liberal policy of the Code, in causing parties to be brought in (*sec.* 122) in order to prevent circuity of action, leads to the conclusion that this application should be granted.

The defendant may interpose the same defenses in this as in such other action, except the statute of limitations, and where the merits presumptively appear, and the plaintiff would otherwise be remediless, it is the duty of the court to exercise a sound discretion and save the statute.

SUPREME COURT.

James McGuiness agt. The Mayor, Aldermen and Commonalty of the City of New York.

Damages — defective piers — liability of corporation.

The corporation of the city of New York, as owners of the wharves and piers, are liable for any loss or damage sustained by reason of their defective construction or dangerous condition.

The common council are the exponents of the will of the corporation, and the settlement or compromising of a legal claim for damages falls within their lawful powers.

Plaintiff presented his claim to the common council for damages, in the sum of $400, for the loss of his horse and cart from one of the wharves owned by defendants. The common council passed a resolution allowing to plaintiff the sum of $350, to be paid by the comptroller from the appropriation for city contingencies, or any other appropriate account.

Held, that the resolution was not the incurring of expense by any of the departments or by the officers thereof. It was a direction to pay a liability which the law imposed upon defendants, which liability was settled and compromised at the amount specified in the resolution, therefore, section 101 of the charter of 1870, which provides "that no expense should be incurred unless an appropriation shall have been previously made covering such expense," does not apply.

Special Term, January, 1877.

The plaintiff was the owner of a horse and cart, which were lost in 1869 from the wharf owned by the defendants, at the foot of Fifty-third street and the East river.

His claim for damages in the sum of $400, was presented to the common council of the defendants, and in 1871, that body passed a resolution allowing to plaintiff the sum of $350, to be paid by defendants' comptroller from the appropriation for city contingencies, or any other appropriate account. The

resolution took effect December 21, 1871. Plaintiff accepted the sum as a compromise of his claim for damages, but the comptroller refused to pay plaintiff, and this action was brought to recover the amount as settled by the resolution.

The answer of defendants contained the following defense: "At the time of the passage of the said resolution, as alleged in the complaint, all the moneys in defendants' treasury, theretofore appropriated for city contingencies for 1871, had been paid out, and there were no moneys in defendants' treasury on the 21st day of December, 1871, to the credit of said appropriation. To this defense plaintiff demurred, as not containing any defense to plaintiff's action.

Elliott Sandford, for plaintiff. The defendants compromised and settled plaintiff's claim for damages (*Wehrum* agt. *Kuhn*, 34 *Supr. Ct.*, 336; *affirmed*, 61 *N. Y.*, 623; *Adams* agt. *Sage*, 28 *id.*, 110, 111; *Brady* agt. *The Mayor, &c., of Brooklyn*, 1 *Barb.*, 584; *Board of Supervisors of Orleans County* agt. *Bowen et al.*, 4 *Lans.*, 24). As to defendants' liability for damages, *Hutson* agt. *The Mayor, &c.* (9 *N. Y.*, 163); *Furman* agt. *The Mayor, &c.* (10 *id.*, 567); *Moody* agt. *The Mayor, &c.* (43 *Barb.*, 282); *Taylor* agt. *The Mayor, &c.* (4 *E. D. Smith*, 559). The resolution was directory as to the comptroller (*Detweiler* agt. *The Mayor, &c.*, 1 *T. & C.*, 657), and of itself incurred no expense. The claim arose *ex delicto*, and the appropriations made are for current expenses of the city government; no provision is made for damages.

David J. Dean, for defendants. By section 101 of the charter of 1870, it was provided that no expense should be incurred by any department, board or officer thereof, whether the object of expenditure shall have been ordered by the common council or not, unless an appropriation shall have been previously made, covering such expense. A previous appropriation was necessary. The resolution is void, because the appropriations for city contingencies were exhausted prior to the passage of the resolution.

LAWRENCE, *J.*— I am of opinion that the demurrer interposed by the plaintiff to the third paragraph of the defendants' answer should be sustained. The defendants, as owners of the pier, were liable to the plaintiff for any loss or damage which he sustained by reason of its defective construction or dangerous condition (*Moody* agt. *The Mayor, &c.*, 43 *Barb.*, 282; *Taylor* agt. *The Mayor, &c.*, 4 *E. D. Smith*, 559).

I know of no law which prohibits the city from compromising such a case and thereby avoiding litigation.

The common council are the exponents of the will of the corporation, and the resolution which they passed directing the payment of the sum of $350 as a settlement or compromise of the plaintiff's claim seems to me to fall within their lawful powers.

I do not regard the 101st section of the charter, on which the defendants' counsel relies, as applicable to this case. The resolution was not the incurring of expense by any of the departments or by the officers thereof. It was a direction to pay a liability which the law imposed upon the defendants, which liability was settled and compromised at the amount specified in the resolution.

The law imposed the liability. The plaintiff's right of action was complete when the accident occurred, if he had a right of action at all.

If the defendants became convinced that they could not successfully resist a suit at his hands, and therefore determined to compromise the claim, the plaintiff surely cannot lose his right of action against them by their failure to make an appropriation, or by their directing that the claim be paid out of an appropriation which has been already exhausted (*See Detweiler* agt. *The Mayor, &c.*, 1 *T. & C.*, 658).

If these reasons are sound, it is unnecessary to consider the other questions which were discussed by counsel upon the argument, and there should be judgment for the plaintiff on the demurrer, with costs.

N. Y. SUPERIOR COURT.

JOHN D. SULLIVAN agt. MARY JANE SULLIVAN.

Reference for the disposition of the issues in actions for divorce on the ground of adultery — rules and practice.

In an action for divorce on the ground of adultery, where the defendant appears and in her answer denies each and every allegation contained in the complaint, except the allegation of marriage, an issue is joined which must be disposed of in some way authorized by law. It can be disposed of only by a trial, and there are but three modes of trial, viz.: 1, by jury; 2, by the court; and 3, by a referee.

In such action a trial may be had before a referee, by section 270 of the Code, which gives to parties an absolute right to a reference of the issues, provided they agree in writing to that effect; but the proper order for that purpose must be procured.

An order of reference in an action for divorce, after issue joined, requiring the referee simply to take proof of all the material facts set forth in the pleadings, and to report the same to the court with his opinion thereon, confers no power to try, and is irregular.

A referee is but the creature of the statute and an order, and as such possesses no greater jurisdiction than is delegated to him by the order. Authority is conferred upon him by a special grant for the purposes of each particular case. Unless the order of reference empower him to hear and determine the issues, he has no such power, and where no such authority has been conferred, there can be no trial of the issues.

To confirm the report of a referee under such circumstances, and award judgment thereon on a mere motion, would amount substantially to a trial of the issues by the court upon affidavits.

It is only in cases where no issue has been joined, or where some interlocutory question is involved, that a reference to simply take and report evidence is now allowable.

The law, and the rules and practice of the court which govern references for the disposition of the issues in actions for divorce on the ground of adultery, very fully pointed out.

Special Term, March, 1877.

Sullivan agt. Sullivan.

Action for divorce brought by plaintiff against his wife on the ground of adultery. The case was sent to a referee, who reported in favor of the plaintiff, and a motion is now made to confirm the referee's report and for the entry of judgment.

Freedman, *J.* — There are several reasons why the motion should not prevail. No proof appears to have ever been made as to the service of the summons and complaint as required by Rule 87. Notice of appearance and retainer is not sufficient. The referee, in his report as originally made, was of the opinion that the proofs taken by him established that the defendant did commit adultery with one Robert Warren, as alleged in the complaint, and with him only. The testimony upon this point was not satisfactory to the court, for the case was referred back to the referee to take further proof of defendant's adultery. Further proof was taken, and the same consists of the confession of a man named Nicholas Duffy to the effect that he had sexual intercourse with the defendant. But the report does not show, nor does it appear anywhere, that such further proof, which confessedly was taken at a time and place at which the defendant was neither present in person nor represented by counsel, was regularly taken on notice to the defendant, nor does the referee express an opinion as to its credibility. The most serious objection, however, is that the whole reference was irregular. The defendant appeared in the action. By her answer she denied each and every allegation contained in the complaint, except the allegation of marriage. The issue thus joined must be disposed of in some way authorized by the law. It can be disposed of only by a trial, and there are but three modes of trial, viz.: 1, by jury; 2, by the court; and 3, by a referee.

It is evident that the parties meant to have a trial before a referee, and this they could have had, if they had procured the proper order for that purpose, for section 270 of the Code expressly provides that "all or any of the issues of the action, whether of fact or of law, or both, may be referred upon the

written consent of the parties." But instead of procuring an order directing the referee to hear and determine the issues, they had an order entered requiring him simply to take proof of all the material facts set forth in the pleadings and to report the same to the court with his opinion thereon. This order conferred no power to try. Though the office of a referee under the Code has been greatly varied and enlarged from that which was held under the former law and practice, and though in a number of cases — and in all by consent of parties and court — he may become vested with the jurisdiction of a judge, so that his decision in a given case is equivalent to the judgment of the court at special term, and only reviewable in the same manner, it must be remembered that, after all, he is but the creature of the statute and an order, and as such possesses no greater jurisdiction than is delegated to him by the order. Authority is conferred upon him by a special grant for the purposes of each particular case. Unless the order of reference empower him to hear and determine the issues, he has no such power. And no such authority having been conferred in this case, there was no trial of the issues. On the other hand, there has been no trial by the court, and to confirm the report and award judgment thereon on a mere motion would amount substantially to a trial of the issues by the court upon affidavits. The mistake committed herein is of such frequent occurrence that I deem it advisable to point out, somewhat in detail, the law, and the rules and practice of the court which govern references for the disposition of the issues in actions for divorce on the ground of adultery. I have already shown that section 270 of the Code gives to parties an absolute right to a reference of the issues, provided they agree in writing to that effect. Section 272 provides that the trial by referee shall be conducted in the same manner and on similar notice as a trial by the court, and that the report of the referee upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried

by the court. Now, if an action for divorce were an ordinary action at law or in equity, affecting only private interests, no order to confirm the report would be necessary, and judgment could be entered upon it without application to the court, as provided by section 272. But there is a broad distinction between actions for divorce and all other actions which may be brought for the enforcement of a mere private right. In actions for divorce the court has no inherent power to decree a dissolution of the marriage contract. Neither the common-law courts nor the court of chancery, in England, possessed it. The jurisdiction in relation to marriage and divorce was confined, until very recently, to the ecclesiactical courts; although parliament occasionally granted divorce dissolving the marriage contract for adultery. Whatever power, therefore, the court possesses, is given by statute; it can exercise no power on the subject of divorce, except what is expressly specified in the statute (*Peugnet* agt. *Phelps*, 48 *Barb.*, 566). The policy of the statute, as shown by LAMONT, J., in *Blott* agt. *Rider* (47 *How.*, 90), is founded in the broad distinction which exists between divorce causes and all other subjects of mere private litigation. Society is interested in contracts of marriage. It is an inseparable incident, in our civilization, to the status of marriage, that it cannot be dissolved at the will of the parties. It is not a contract, in the full common-law sense of the term, but a civil institution, established for great public objects. Not only the parties but the public have an interest in marriage and its dissolution; and growing out of this two-fold relation we have the doctrine running through all the matrimonial suits and bringing into subserviency all other laws on the subject, that the proceeding, though upon its face a controversy between the parties of record only, is, in fact, a triangular suit *sui generis*, the government or public occupying the position of a third party without counsel, it being the duty of the court to protect its interests. From these principles it follows that no decree of nullity, or of divorce

from bed and board or from the bonds of matrimony, can be entered by the court upon the mere consent of the parties of record, because they cannot bind the public. There must be a complaint in due form for a cause authorized by law, sustained by due proof. A default does not, as in other suits, supersede the necessity of proof, or lighten the burden of the plaintiff in establishing the allegations. In recognition of these principles the statute prescribes the cases in which the court may decree a divorce and dissolve the marriage for adultery, but, at the same time, leaves it in every case to the discretion of the court to do so. And though the fact of adultery be clearly proven, the court is specifically authorized to deny a divorce in the following cases: 1. Where the offense shall appear to have been committed by the procurement or with the connivance of the complainant. 2. Where the offense charged shall have been forgiven by the injured party, and such forgiveness be proved by express proof or by the voluntary cohabitation of the parties, with the knowledge of the fact. 3. Where there shall have been no express forgiveness and no voluntary cohabitation of the parties, but the suit shall not have been brought within five years after the discovery by the complainant of the offense charged. 4. Where it shall be proved that the complainant has also been guilty of adultery, under such circumstances as would have entitled the defendant, if innocent, to a divorce. Here, then, is the court as the official guardian of the public interests, with a duty pointed out by statute. The Code has neither enlarged nor diminished the jurisdiction which the court previously possessed (*sec.* 10), and section 469 expressly saves the old rules and practice of the courts, so far as they are not inconsistent with the provisions of the act, subject to the power of the respective courts to relax, modify or alter the same. In pursuance of the powers thus conferred, and of the requirements of another statute directing the enactment of rules of practice, the judges of the courts of record in this state, in convention assembled, established, among other rules, certain rules for the regulation of the practice in divorce

cases (23, 24, 87 *to* 92). These rules, among other things not necessary to be mentioned, provide against judgments by default, for full and detailed proof of the service of the summons and complaint, for the insertion in the complaint of the proper allegations negativing the existence of the causes, for any one of which the court is specifically authorized by the statute to withhold a decree, notwithstanding the fact of defendant's adultery and the examination of the complainant with reference to them, and for the ascertainment of all the material facts constituting the offense charged. They also provide that in no case shall a reference be ordered to a referee nominated by either party, nor to a referee agreed upon by the parties, nor without proof by affidavit, conformably to Rules 23 and 24, of the service of the summons and complaint, and that notice of appearance and retainer shall not be sufficient. And it may be well to point out here that the power to appoint a referee in this class of cases, notwithstanding all the parties in the action objected to him, is expressly conferred upon the court by section 273 of the Code. Finally, the ninety-second rule provides that no judgment in an action for divorce shall be entered, except upon the special direction of the court. These rules, says LAMONT, J., in *Blott* agt. *Rider*, above referred to, are tantamount to a declaration by all the judges that the course so directed is necessary to prevent a failure of justice. Although, therefore, the issues in an action for divorce may be tried pursuant to sections 270, 272 and 273 of the Code, by a referee appointed by the court for that purpose, his report is not sufficient authority for an entry of judgment thereon by the clerk. The report, containing the findings of fact and conclusions of law of the referee, must be brought before the court, together with the evidence (*Blott* agt. *Rider*, 47 *How.*, 90). But, on the other hand, the ninety-second rule does not change the requirements of the Code, that the references of the issues shall be for the purpose of hearing and determining the same, and that the trial before the referee shall be conducted in the same manner as a trial by the court.

The rule cannot abrogate the statute, nor was it ever intended that it should have that effect, the granting of a decree of divorce being discretionary with the court. The court, under the ninety-second rule, simply exercises a supervisory power over trials by referees, as a part of the system inaugurated by the Constitution of 1846. The former practice in equity suits, by which evidence was taken before an examiner, and not in the presence of the tribunal deciding the issues, was done away with (*Const. of* 1846, *art.* 6, *sec.* 10), and it is only in cases where no issue has been joined, or where some interlocutory question is involved, that a reference to take and report evidence is now allowable (*Code*, *secs.* 246, 271). Moreover, in the following cases it was expressly decided that a reference in an action for divorce, after issue joined, to take the evidence and report the same, is irregular, though both parties appeared before the referee (*Diddell* agt. *Diddell*, 3 *Abb.*, 170; *Merrill* agt. *Merrill*, 11 *Abb.* [*N. S.*], 74; *Waterman* agt. *Waterman*, 37 *How.*, 36). In *Bihin* agt. *Bihin* (17 *Abb.*, 19), which was an action for a limited divorce, and had been referred to a referee to hear and determine the same, the general term of the supreme court of the second district went even so far as to hold, that in such a case judgment can be entered upon the report of the referee without any application to the court. But in that case the court clearly overlooked the rule. There is but one way that I can see in which evidence erroneously taken after issue by a referee, pursuant to an order to that effect, can be used in an action for divorce, and that is, that by consent of parties it may be read upon a subsequent trial had before the court, and brought on on regular notice and in the usual way. In such case it may be treated as, and it will have the force of, a conditional examination of witnesses before trial. But this course must be agreed to by the parties, and thereupon the court must try the issues and make its own findings of fact, and draw its own conclusions of law therefrom. As the case stands at present, I have no alternative but to deny plaintiff's motion for confirmation of the report, and for judgment thereon.

SUPREME COURT.

PATTERSON agt. COPELAND et al.

Specific performance — Parol agreement — Action against executors — Abatement — Parties — Evidence.

A parol promise by the owner of land to give it to another, accompanied by actual possession thereof by him, will be enforced in equity by a decree for specific performance, where the promisee, induced by such promise, has made substantial improvements, and expended considerable money upon the premises, with the knowledge of the promisor.

Where A, with a view to aid his brother B, purchased a farm, and B entered, occupied and improved it, greatly enhanced its value by his own labor, and with his own means, and paid all taxes, and the interest on the purchase-money to A, year after year, under and pursuant to a parol agreement and understanding between them, that the premises should be his, on refunding to A the purchase-money.

Held, that contracts like this will be respected and enforced by the court, by a decree of specific performance.

The question as to whether an action is against the defendants personally, or against them in their representative capacity as executors, is to be determined by the averments in the complaint, and where the facts stated and the prayer for relief fully characterize the action as one against them in their representative capacity, it is sufficient, although in the title to the cause they are not named as executors.

An action to compel a specific performance of a contract entered into by the deceased, brought against his executors, does not *abate*, nor is it put in abeyance by the death of one of the three executors. The right of action and the ground of relief continues against the surviving executors; the decree could be against them the same as if their co-executors had lived. A suggestion of the death of the co-executor in the record is all that is necessary.

An objection that there is a defect of parties, must be taken either by demurrer or answer, or it will be deemed to have been waived.

In an action against executors for a specific performance of a contract, entered into by the testator, persons claiming through such testator are

not necessary parties. The decree against the executors to make the conveyance would bind all parties claiming through the latter.

The provision of section 399 of the Code, prohibiting a party, in certain cases, from testifying to a personal transaction or communication between him and a deceased person, does not preclude a party from testifying to statements made by a deceased person to a third party in the witness' presence, and this, too, even although the witness should participate in the conversation.

In equity actions the court will look to the entire case, and see whether substantial justice has been done, and when that appears it will affirm the judgment, notwithstanding the admission of testimony which, in ordinary actions at law, might have necessitated a new trial.

Third Department, General Term, May, 1876.

LEARNED, *P. J.*, BOARDMAN *and* BOCKES, *JJ.*

THIS is an appeal by the defendants, from a judgment entered against them, on the direction of a referee.

The action was brought to compel the specific performance of a contract alleged to have been made between the plaintiff and defendants' intestate, for the conveyance by the latter to the former of the premises described in the complaint. The case was referred to a referee, who gave judgment against the defendants, by which they were required to convey the premises to the plaintiff, as demanded in the complaint.

The referee found on the proofs submitted to him, that, in 1840, the plaintiff and Joseph Patterson, the defendants' intestate, entered into an oral agreement by which the said Joseph was to purchase the premises at the price of $1,000 and take title to himself; that the plaintiff was to enter into and have possession of the same, and manage, cultivate and improve them, and have the avails; to pay all taxes and also pay to Joseph the interest annually on the $1,000 purchase-money, until such time as he should choose to pay the principal, and that on payment to Joseph of such principal, the latter should convey the premises to him. The referee further found, that Joseph made the purchase and took the title to himself, pur-

suant to such agreement, and that thereupon, and under and pursuant to the same, the plaintiff entered into possession of the farm and paid the taxes, and also the interest on the purchase-money to Joseph yearly, and every year until 1869, when, on his offering the interest, Joseph stated that he would take no more, but would give the plaintiff a deed. The referee further found the plaintiff, relying upon such agreement, had greatly improved the premises, by erecting valuable buildings thereon, and by clearing up and fencing the same, so that the value thereof was increased from $1,000 from the time he entered into possession to $4 000 or $5,000 at the commencement of the action.

The referee also further found that Joseph died in 1870, having made a last will and testament, in which he appointed the defendants and one Joseph Cronin executors thereof, whereby he empowered his executors to sell and convey all the lands he owned, except what was specifically devised, and turn the same into money, and that the premises in question were not so devised.

That such will was afterwards, and in 1871, proved and admitted to probate, and letters testamentary were duly issued to said executors, but that said Cronin died after the com mencement of this action.

The referee further found that said testator still held the title of the premises at the time of his decease, having declined to convey the same to the plaintiff, notwithstanding the latter had offered to pay him the purchase-money, placing his omission to convey, on the ground that all he wanted was the interest while he lived, and that on his death the premises would belong to the plaintiff.

As matter of law, the referee held and decided that the plaintiff was entitled to a specific performance of the contract, and directed judgment that the executors convey the premises to the plaintiff on payment to them of the aforesaid purchase-price, with the interest thereon remaining unpaid, and charged the estate with the plaintiff's costs.

Judgment being entered pursuant to such action, the defendants appealed.

A. D. Wait, for plaintiff.

H. S. Dodd & L. H. Northup, for defendants.

BOCKES, *J.*—The facts found by the referee in this case are well established by the proof. That the testator, with a view to aid his brother, the plaintiff, made the purchase of the farm, and that the latter entered, occupied and improved it, greatly enhanced its value by his own labor and with his own means, and paid all taxes and the interest on the purchase-money to the testator, year after year, under and pursuant to an understanding and agreement between them that the premises should be his on refunding to the testator the purchase-money, admits of no doubt.

The evidence is clear, direct, and full to those facts. It seems quite probable that the testator did not intend to exact the principal sum, but proposed ultimately to discharge the debt to his brother, but never having done this in a legal and effective way, the referee was right in requiring its payment as a condition of the conveyance. The case of *Freeman* agt. *Freeman* (43 *N. Y.*, 34), resembles the one in hand in many respects, and shows that contracts like that found by the referee in this case will be respected and enforced by the court.

The testator was often on the premises; saw the improvements going on; advised them and spoke of them as beneficial to the plaintiff; accepted annual payments as interest (not as rent); said he purchased the farm for his brother; spoke of a bargain with him; said his word was as good as his bond; that all that he wanted was the interest on his money as long as he lived; that, on his decease, the farm would be his brother's, and that he would give him a deed of it. His omission to give the deed seems to have been occasioned by his

negligence, and was continued until a just purpose was frustrated by death, as is often the case when duty is postponed. Any other construction than that given the evidence by the referee would have been manifestly unjust and inequitable. The acts of the parties through a series of years; the fair and just import of many conversations between them, with their promises and clearly-expressed purposes, combine to give support to the conclusions arrived at by the referee, which in their legal application work out a just result.

But it is insisted that technical difficulties are presented in the case which require a reversal of the judgment. It is urged that the action is against the defendants, personally, and not against them in their representative capacity as executors.

This question is to be determined from the averments in the complaint (*Hallet* agt. *Harrower*, 33 *Barb.*, 537; *Fowler* agt. *Westervelt*, 40 *id.*, 374). Those averments made a case against the defendants, as executors.

The facts stated and the prayer for relief fully characterize the action as one against the defendants in their representative capacity, and the defendants appeared and answered as executors.

This alleged ground of error is without support. Nor did this action abate, nor was it put in abeyance by the death of one of the three executors.

The right of action and ground of relief here continued against the surviving executors (*Lachaise* agt. *Libby*, 21 *How.*, 363; *Shook* agt. *Shook*, 19 *Barb.*, 653; *Leggett* agt. *Dubois*, 2 *Paige*, 211; 2 *R. S.* [*Edmd. ed.*], 79, *sec.* 44). The litigation remained against the surviving parties, and the decree could be against them the same as if their co-executors had lived.

A suggestion of the death of the co-executor in the record was all that was necessary. Nor is the objection that there is a defect of the parties well taken. As regards the defendants on the record they must be deemed to have

waived this objection if it had foundation in fact, because not taken either by demurrer or answer (*Code, sec.* 148; *Potter* agt. *Ellice*, 48 *N. Y.*, 321; *Lee* agt. *Wilkes*, 27 *How.*, 336). Having taken issue on the facts alleged in the complaint, it became the duty of the referee to try and determine the questions presented on the pleadings. But there was, in fact, no defect of parties. According to the admissions in the answer, it lay with the executors to perform the contract alleged in the complaint and found by the referee; it devolved on them to carry the agreement of the testator into effect. The rights of the testator prior to his decease, and of his executors under his will, were such only as pertained to a vendor under a contract for the sale of lands. The decree against the executors to make conveyance on receiving the balance due on the contract of sale made by their testator, would bind all parties claiming through the latter. It is further insisted that improper evidence was admitted, and it is claimed that the judgment must be reversed by reason of such error. The plaintiff was allowed to testify against such objection to what he heard the deceased testator say to a third party in his presence. He testified that he was present at an interview between testator and Mr. Tefft, from whom the latter made the purchase of the farm, and heard the testator tell Mr. Tefft that he was going to buy the place for him, the plaintiff; that all he wanted was the interest on his money as long as he lived, and that the place was to belong to the plaintiff on his, the testator's, death. This evidence was objected to as inadmissible under section 399 of the Code, as being a personal transaction or communication between the witness and the deceased. But it was not such. It was a communication of statements made by the deceased to a third party in the witness' presence. He could testify to such statement. It was so held in *Cary* agt. *White* (59 *N. Y.* 336). And this too, even, although the witness should participate in the conversation, JOHNSON, J., says: "It must, I think, be regarded as settled under the present provision of the Code,

that the three hundred and ninety-ninth section does not preclude a party from testifying to the statements of a person deceased, made to a third person in the hearing of the witness."

The learned judge cites *Lobdell* agt. *Lobdell* (36 *N. Y.*, 33, 34), and *Simmonds* agt. *Sisson* (26 *N. Y.*, 277), in support of his remark. The prohibition contained in section 399 did not reach and cover the evidence objected to; the testimony given by other witnesses was also objected to as prohibited by section 399, but very manifestly there were no grounds for objection.

They were not parties claiming through or under the deceased in a sense which could exclude the testimony given by them.

But there is another answer to the objection urged against the evidence above alluded to. Strike out all the evidence to which this objection can with any reason of fairness apply, and sufficient will still remain to afford abundant support to the findings of the referee.

In equity actions the court will look to the entire case, and see whether substantial justice has been done, and when that appears it will affirm the judgment, notwithstanding the admission of testimony which in ordinary actions at law might have necessitated a new trial (*Church* agt. *Kidd*, 5 *N. Y. Sup. Ct. R.*, 454; *Platt* agt. *Platt*, 2 *id.*, 454; *Clapp* agt. *Fulerton*, 34 *N. Y.*, 190). In this last case it is laid down by PORTER, J., that on a rehearing in equity the admission of improper evidence on the original hearing, furnishes no ground for reversing the final decision, if the facts established by legal testimony are plainly sufficient to uphold it. So in *Schenck* agt. *Dart* (22 *N. Y.*, *on page* 424), COMSTOCK, J., in remarking on this class of cases, says: "That it is the duty of the supreme court to pronounce such a judgment as the competent evidence would justify."

There exists in this case no ground for a reversal of the judgment, because of the admission of improper evidence. The granting of costs to the plaintiff was, in the sound dis-

cretion of the referee, to be exercised, as it manifestly was here, in accordance with settled rules (*Van Riper* agt. *Poppenhousen*, 43 *N. Y.*, 68; *Barker* agt. *White*, 5 *Abbott N. S.*, 124). Whether or not the suit could be sustained, as an action to redeem on the hypothesis that the deed was in the nature of a mortgage to secure the payment of the purchase-money, need not be here discussed.

We are of the opinion that substantial justice is answered by the judgment entered, and that it should be affirmed with costs.

So ordered.

BOARDMAN and LEARNED, JJ., concurred.

N. Y. SUPERIOR COURT.

In the Matter of the Application of JOHN H. PLATT, as assignee in bankruptcy, to sue HENRY S. PIERSON, jr., a receiver appointed by this court.

Receiver — when application for leave to sue will be denied.

As a general rule, leave will not be granted by this court to sue a receiver appointed by its authority, in any other tribunal.

It is only when special facts and circumstances are shown to exist which render a departure from the regular course and practice of the court advisable, that such leave will be given.

A general assignment for the benefit of creditors, without preference, has been held by the court of appeals of this state to be perfectly valid and unassailable under the bankruptcy act; but the federal courts in this district have held directly the reverse (*See McDonald, assignee, agt. Moore et al., N. Y. Weekly Digest, December* 25, 1876).

Held, that the power vested in the supreme court of the United States to review these decisions, does not abate the authority of the court of last resort in this state over its inferior tribunals, and hence, until this conflict is finally determined, the court should not grant leave to have its own officer sued in a tribunal which is known to administer the law in a different way from that which this court is bound to observe.

Therefore, leave will not be granted an assignee in bankruptcy to sue, in the United States court, a receiver appointed by this court, the object of the suit being to cause him to turn over the property of the bankrupt in his hands as receiver, to the assignee in bankruptcy.

Special Term, March, 1877.

MOTION to set aside an *ex parte* order for leave to sue.

On application of John H. Platt, as assignee in bankruptcy of Ephraim S. Snow, for leave to sue Henry S. Pierson, jr., a receiver appointed by the superior court, an *ex parte* order

granting the application was issued, and the defendant, Pierson, moved to have that order set aside. In his affidavit, receiver Pierson states that he was appointed receiver of Snow's estate, which was conveyed to Ferdinand Stern on the 16th day of October, 1876, by a voluntary assignment for the benefit of creditors; that he was recently served with a writ, issued out of the United States district court, in the above entitled suit, and that, upon inquiry, he learned that the above *ex parte* leave to sue had been granted, the object of the suit being to cause him to turn over the property to the assignee in bankruptcy.

George H. Fletcher and *Robert Sewell*, for motion.

Waldo Hutchins, opposed.

FREEDMAN, *J.* — This court having undertaken to determine who is the proper party to distribute the estate assigned pursuant to the laws of this state by the debtors for the benefit of their creditors, and having, by its receiver, possession of the fund, and thus full jurisdiction over it, it is perfectly competent to decide all questions relating to its distribution. As a general rule, leave will not be granted by this court to sue a receiver, appointed by its authority, in any other tribunal. It is only when special facts and circumstances are shown to exist which render a departure from the regular course and practice of the court advisable that such leave is given.

But in the present case I fail to perceive that such special facts and circumstances exist; on the contrary, strong reasons have been advanced why such leave should be withheld.

Assignments like the one in question have been held by the highest court in this state to be perfectly valid and unassailable under the bankruptcy act, while the federal courts in this district have reached a different conclusion. The power to review these decisions, which is vested in the supreme

court of the United States, does not abate the authority of the court of last resort in this state over its inferior tribunals, and hence, until the conflict is finally determined by the supreme court of the United States, I must abide by the law as settled in this state. This being so, this court should not grant leave to have its own officer sued in a tribunal which is known to administer the law in a different way from that which this court is bound to observe, and whose jurisdiction is invoked for the purpose of nullifying the conclusions at which this court has arrived.

Nor does the use which the assignee in bankruptcy made of this *ex parte* order granting such leave, entitle him to favorable consideration, for he did not sue the receiver as an officer lawfully appointed by this court, and having the lawful custody of the fund, but as an individual having in his possession certain property, the title to which is alleged to be in such assignee. If that was the true condition of affairs, the leave of this court was wholly unnecessary.

The order heretofore granted *ex parte* should be vacated and set aside, but the assignee in bankruptcy may have leave to bring such action in this court as he may be advised.

UNITED STATES DISTRICT COURT.

The United States agt. John Hayden, John Grady and Robert Parker.*

To warrant a conviction of an inspector of election, chosen under a state law, for making a false certificate of the result of a canvass for representative in congress, it must appear that the certificate was made by such inspector fraudulently; and the fact that a fraud upon the ballot-box was committed by some unknown person, no agency of the inspector being shown, is not sufficient to warrant a conviction under section 5515 of the United States Revised Statutes.

It is not a criminal neglect of duty for an inspector of election to deliver the keys of a ballot-box, on the morning of election, to a policeman assigned by the city authorities to do duty at the poll on election day, where this is proven to have been the custom in the city in which the election was held, and where it is under the apparent sanction, though not strict construction, of the police law of the city.

The Revised Statutes of New York prescribe that the ballots, in certain specified boxes, shall be canvassed in a particular order; a failure by the inspectors to canvass in that order, in the absence of a guilty or improper motive, is not a criminal offense.

The court should always direct a verdict of not guilty where it is of opinion that the evidence will not authorize the jury to find a verdict of guilty, or if so found would set aside the verdict as contrary to evidence.

Utica Term, March, 1877.

Wallace, *district judge, presiding.*

A bill of indictment was found against the defendants at the last January term of this court. It contained two counts. The first charged that the defendants, as inspectors of election of the western election district of the Eighth ward of the city of Albany, on the day of election, held on the 7th day of

* The requisites of an indictment under United States election law stated (*The U. S.* agt. *Cruikshank et. al.*, 92 *U. S. R.* [2 *Otto*], 542).

November, 1876, knowingly, wrongfully and unlawfully fraudulently made a false certificate of the result of the election in said election district in regard to representative in congress, whereby they allowed one Terence J. Quinn 945 votes and one Hamilton Harris fifty votes, when, in truth and in fact, said Harris received more than said fifty votes and said Quinn less than said 945 votes. The second charged, that while it was the duty of said defendants, as such inspectors, to make a true certificate of the result of such election, in said election district, in regard to said representative in congress, yet that said defendants neglected their duties, in not immediately, at the final close of the poll, taking possession of the ballot-box containing the votes cast for representative in congress, and immediately open and canvass the ballots therein contained; and that with intent to affect such election, in said election district, in regard to representative in congress, knowingly suffered and permitted the said ballot-box to go out of their possession, and knowingly suffered and permitted ballots in said box for representative in congress to be wrongfully taken from said ballot-box and destroyed and false and fraudulent ballots to be inserted in lieu thereof.

The defendants plead not guilty.

At this term of the court a jury was impanneled and the trial of the prisoners, under said indictment, took place. The material facts, proved by the prosecution, are as follows:

The prisoners, chosen under the laws of the state of New York, constituted the board of inspectors of election in and for the western election district of the Eighth ward of the city of Albany (a portion of the sixteenth congressional district of said state of New York), on the general election, held on the 7th day of November, 1876. The other officers of election were two poll clerks, appointed by the police commissioners of the city, two supervisors of election and two marshals, appointed pursuant to section 2012 of the United States Revised Statutes. The polling place was designated by the common council of said city. Before the polls were opened,

said police commissioners provided prisoners with six ballot-boxes, one each for electoral, state, congressional, judiciary, assembly and constitutional amendment ballots. All the boxes were examined and locked, and in the presence of all the officers of election, without objection, the keys of all the said boxes were delivered by one of the prisoners, Hayden, to one Michael Nolan, one of the patrolmen assigned to perform police duty at that poll that day, under the direction of the police commissioners of the city, and were retained until returned by him in the evening to open the boxes, that the ballots in each might be canvassed. It had been the custom in this and other election districts in said city, for at least six years prior, to make one of the patrolmen attending the poll the custodian of the ballot-boxes and their keys, except during the taking of the ballots and the time the ballots in a particular box were being canvassed. Nine hundred and ninety-five ballots were cast in that district for representative in congress. At sun-set the polls were closed and the ballot-boxes were placed by the authority of the prisoners in the custody of the patrolmen, now three in number, and retained by them until the prisoners, as such inspectors, called for a particular box, when it was delivered to them. Besides the officers of election and patrolmen, four citizens designated by the police commissioners of said city, were present to witness the canvass. The politics of the witnesses and officers of election were four democrats and five republicans.

The electoral ballots were first canvassed, with this result:

Democrat, 678 votes; republican, 316 votes.

Next, the assembly ballots, as follows:

Democrat, 593 vote; republican, 392 votes.

It was shown that by the general desire of those present at the canvass, and as one of the candidates lived in the ward, the assembly ballots were canvassed out of the regular order.

Next, the congressional ballots, as follows:

Democrat (T. J. Quinn), 945 votes; republican (H. Harris), fifty votes.

The other boxes were canvassed with substantially the same result as that of the electoral ticket.

It was shown that after the polls were closed that evening, and before the congressional ballots were canvassed, the room in which the canvass took place was, for a short time, somewhat dark; that all the boxes were placed in the back part of the room near an open window, at which, during the evening, the shadow of a man was, for an instant, seen by one of the witnesses of the canvass.

The prosecution called 100 voters, residents of the election district, who each testified * that, on the 7th day of November, 1876, they voted for Hamilton Harris for representative in congress. It was proposed to call 116 additional voters to testify to same effect, but the court thought it unnecessary to accumulate evidence upon that point.

It was also shown that one elector voted a peculiar silver backed greased congressional ballot, upon which was the name of Hamilton Harris, and this was not found in the congressional ballot-box during the canvass. Some of the ballots in this box looked clean and had the appearance of being little handled.

Each of the witnesses, who was present at the canvass, testified that the counting of the votes in all the ballot-boxes was fair and correct, and that they saw nothing done wrong, nor did they see the prisoners deviate from an honest course of action.

Upon the conclusion of the proof for the prosecution, a motion was made, by the prisoners' counsel, requesting the court to instruct the jury to acquit the prisoners, as it was not shown that either of the prisoners had committed a criminal offense.

Henry Smith, *Edward J. Meegan*, *J. Thomas Spriggs* and *E. Countryman*, for the prisoners.

Messrs. Crowley (U. S. attorney), *Pound* and *Murray* (assistant U. S. attorneys), for the prosecution.

* A voter may be required to disclose for whom he voted, although using a secret ballot (*The People* agt. *Thacher*, 55 *New York R.*, 525).

WALLACE, *J.*, said, in substance: The indictment is found under section 5515 of the Revised Statutes of the United States, which reads as follows:

"Every officer of an election at which any representative or delegate in congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any state, territorial district or municipal law or authority, who neglects or refuses to perform any duty, in regard to such election, required of him by any law of the United States, or of any state or territory thereof, or who violates any duty so imposed, or who knowingly does any acts thereby unauthorized with intent to affect any such election, or the result thereof, *or who fraudulently makes any false certificate of the result of such election* in regard to such representative or delegate, or who withholds, conceals or destroys any certificate of record so required by law respecting the election of any such representative or delegate, or who neglects or refuses to make and return such certificate as required by law, or who aids, counsels, procures or advises any voter, person or officer to do any act, by this or any of the preceding sections made a crime, or to omit to do any duty, the omission of which is, by this or any of such sections, made a crime, or attempts to do so, shall be punished as prescribed in section fifty-five hundred and ten."

The duties of inspectors of election, under the laws of the state of New York, so far as material to this case, are as follows:

"Section 26. Each box shall be provided with a sufficient lock, and shall be locked before the opening of the poll, and the key thereof delivered to one of the inspectors to be appointed by the board, and shall not be opened during the election, except in the manner and for the purposes hereinafter mentioned" (1 *R. S.* [*6th ed.*], 438).

"Section 37. Immediately after the final closing of the poll, at all general elections hereafter to be held in this state, in the several election districts, except in the city of New

York, the ballot-boxes used at such elections shall be opened and the votes therein canvassed in the manner now provided by law, but as nearly as may be in the following order:

"1. The box containing the ballots indorsed 'electors.'

"2. The box containing the ballots indorsed 'state.'

"3. The box containing the ballots indorsed 'congress.'

"4. The box containing the ballots indorsed 'senate.'

"5. The box containing the ballots indorsed 'assembly.'

"6. The box containing the ballots indorsed 'judiciary.'

"If any other ballot-boxes shall have been used at any such election, in pursuance of law, such other boxes shall be opened and the votes therein canvassed immediately after those hereinbefore specified, in such order as the inspectors of elections at the several polls shall respectively determine" (1 *R. S.* [*6th ed.*], 439).

The prisoners' counsel refer to the Albany police law (*chap. 77 of the laws* 1870 [*1st. vol., S. L.*, 1870], *p.* 208) upon this subject, as follows:

"Section 32. It shall be the duty of said board (police board) to detail, on the day of any election in said city of Albany, at least two patrolmen to each election poll, and to provide ballot-boxes for use at any and all such elections, and to provide for the custody of said boxes at all times, except during the taking, receiving and counting of the votes. Said city of Albany shall pay the expenses of procuring and taking care of its boxes."

"Section 33. It shall be the duty of said board to prevent any booth or box, for the distribution of tickets at any election, from being erected or maintained within one hundred and fifty feet of any polling place within said city, and to see that the arrangements for voting are such as to prevent any avoidable crowding of voters at such polls, and that the challengers of both and all parties have fair and equal room, rights and privileges for the discharge of their duties at each poll, and that the canvassing of the votes be conducted in an orderly, fair, open and public manner, and no person or officer shall

have power to interfere with said board in their discharge of the duties imposed on them by this section."

To warrant a conviction, under the first count of the indictment, it must appear that the prisoners made a fraudulent certificate of the result of the election in the district in question. The proof in this case does not authorize any such conclusion. With reference to the charge contained in the second count of the indictment, it should appear, in order to justify a conviction, that the inspectors of election intended to perpetrate some wrongful act, or omission of duty, or were guilty of some palpable neglect that would lead to the conclusion that a violation of law was designed, and of course this could be inferred, in many instances, from their conduct. There is no doubt that a glaring fraud was perpetrated by some person or persons, but it was so slyly and shrewdly done that it cannot be traced, and while the prisoners may be the guilty persons, the testimony fails to show it. This canvass seems to have been conducted by the inspectors as carefully as canvasses usually are, and with as much regard for the requirements of the forms of the law. The inspectors, in delivering the keys of the ballot-boxes to one of the policemen attending the polls, acted pursuant to the custom prevailing in the district for many years, and this was at least approximately authorized by the police law of the city. There is no proof impeaching the character of the policemen, nor that any of them was an improper person to hold the keys. The canvassing of the assembly box was made by the general consent, or at least the acquiescence of all present, and its substitution in place of the "state" box facilitated the canvass of the congressional box.

I have made it a rule to direct a verdict of not guilty, where, in my opinion, the evidence will not authorize the jury to find a verdict of guilty, or if so found, I would set aside the verdict as contrary to evidence. I think this is a case of that class, and I therefore direct the jury to find a verdict of not guilty.

SUPREME COURT.

GEORGE BUESS agt. GEORGE KOCH.

Contract — breach — tender when excused — damages.

Where, under a contract in writing, for the delivery of a deed of land, and the payment of the consideration, on or before a day named, the party whose duty it was to deliver the deed, before the day named, applied to the party who was to pay the consideration, to name a time and place for performance, and such party remained silent; and where, under such circumstances, the party first named prepared and executed the conveyance, and made all reasonable efforts to find and communicate with the other party to complete the agreement, but which efforts, through the acts and omissions of the other party, were unavailing, such acts and omissions are a waiver of a formal tender.

Upon the breach of a valid contract, the plaintiff is entitled to recover some damages, the amount to be determined upon the trial.

Special Term, October, 1875.

DEMURRER to complaint.

The action is brought to recover damages for a breach of contract.

The complaint sets out the seizin of the plaintiff, on March 1, 1870, of premises on Rivington street, New York city, and a contract between the parties to this action. The contract recites that the defendant had agreed to purchase from one Traeger the premises, and that, at the request of the defendant, the plaintiff agreed to step into the defendant's place, take the property from Traeger, and prepare and alter the building into a shop for the cabinet making business, and lease it to defendant for five years at a certain rent, and, on or before the expiration of five years from May 1, 1875, to

convey the property to defendant at the cost of the premises, with the added cost of the alteration of the building, upon the condition that defendant should pay an annual rent, and, on or before the expiration of five years, the cost of the premises and of the alteration, and receive a deed for the premises.

The complaint alleges that the plaintiff prepared and altered the premises at a cost of $11,666.04; that, in consequence of the alteration, the premises cannot be used for other purposes than a store without further alteration, and that the premises are not so valuable as they would otherwise be; that the defendant occupied the premises so altered, and paid rent up to May 1, 1875; that the plaintiff notified defendant, before May 1, 1875, that the time for performance would expire on that day, and requested the appointment of a time for performance; that the defendant neglected to answer in any way; that the plaintiff subsequently executed a deed in due form and attempted to tender it to the defendant, but this was rendered impossible by the absence of the defendant. Complaint sets out the plaintiff's readiness and willingness, on May 1, 1875, and ever since, to give the deed; that the plaintiff has performed all conditions on his part, and that the defendant has neglected to perform any condition on his part, except to pay the rent. Wherefore the plaintiff demands judgment against the defendant for the sum of $26,000.

Defendant demurs that the complaint does not state facts sufficient to constitute a cause of action.

M. L. Townsend, for defendant.

Kaufman, Husted & Wagner, for plaintiff.

VAN VORST, *J.* — If the defendant has broken his contract with the plaintiff, he is liable in damages, the result of the breach. It is not necessary now to determine the amount of

these damages, nor to decide whether or not the plaintiff will in the end be entitled to recover the specific damages he claims in his complaint. The damages will be determined on the trial. On the breach of a valid contract, the plaintiff is entitled to some damages (*Devendorf* agt. *West*, 42 *Barb.*, 227).

The defendant agreed to pay for the premises on or before the expiration of five years from the date of the contract. This he failed to do. It is true that he was thus to pay upon the plaintiff executing to him a good and sufficient deed of the premises. The acts were to be concurrent.

The demurrer admits the readiness and willingness of the plaintiff to convey. I do not think, under the statements in the complaint, that the defendant can object that no formal tender was made to him in person.

Before the expiration of the time limited by the contract, the plaintiff applied to defendant to name a time and place to fulfill, and expressed his own readiness to convey. As no time or place was mentioned in the contract, this was a proper thing for the plaintiff to do; and good faith, it would seem, called upon the defendant to answer the application in some manner. He remained silent. This is a strong intimation that he did not mean to pay and take the property.

The plaintiff shows that afterwards he made reasonable efforts to find and communicate with the defendant to make a formal tender. He had his conveyances prepared for the purpose, but through the defendant's acts and omissions the plaintiff's efforts were unavailing. I think the defendant's acts and omissions waived a formal tender.

There should be judgment for the plaintiff on the demurrer, with leave to defendant to answer on payment of costs.

SUPREME COURT.

DOLSON and another agt. KERR, sheriff, &c.

Assignment for the benefit of creditors — effect of subsequent bankruptcy proceedings — judgment recovered by creditor.

A general assignment for the benefit of creditors, without giving priority, is superseded by proceedings in bankruptcy.

Where a judgment is recovered by a creditor, in the ordinary course of practice of the courts, and without collusion between the creditor and debtor, for the purpose of giving such creditor priority over others, that judgment, and the levy under it, is good even as against an assignee in bankruptcy subsequently appointed.

On the 11th day of August, 1873, S., being largely in debt, made a general assignment to the plaintiffs for the benefit of his creditors, sharing alike, and no creditor having priority, one over the other. On the same day, one F. commenced an action to recover, and recovered, a judgment upon a note which S. had given to him upon the purchase of a pair of horses, said judgment being recovered on the 3d day of September, 1873, and on the same day an execution was issued and a levy made upon the horses, and they were sold under the execution on the 12th day of September, 1873. The plaintiffs, the general assignees of S., commenced this action to recover the value of the horses on September 9th, 1873. October 11, 1873, after the levy had been made upon the property under the execution of F., bankruptcy proceedings were commenced by A., one of the creditors of S., and a general assignee in bankruptcy was appointed January 22, 1874. The plaintiffs, on the 11th day of August, 1874, executed a paper writing to G., the assignee in bankruptcy, which writing is a full recognition of the regularity of the bankruptcy proceedings, that S. was adjudged a bankrupt, and that he, G., as assignee in bankruptcy, took the title which they, as general assignees, had acquired by the assignment.

Held, that the action could not be maintained by plaintiffs for their benefit, because the bankruptcy proceedings set aside their assignment *ab initio*; that they could not maintain the action in behalf of the general assignee in bankruptcy, because the recovery of F. was without collusion

with S., to give him a priority; that F. was entitled to the priority which his levy gave him.

Ulster Circuit, January, 1877.

THIS was an action to recover the value of a pair of horses sold by the sheriff under a judgment and execution in favor of one Chester Freer, and against one John C. Shaffer, whose general assignees, for the benefit of creditors, the plaintiffs were. At the close of the case the defendants moved for a nonsuit, on which motion the following oral opinion was pronounced, and reported by Spencer C. Rodgers, court stenographer.

J. N. Fiero, for plaintiffs.

J. M. Cooper and *A. Schoonmaker, jr.*, for defendants.

WESTBROOK, *J.* — Preliminarily to the statement of my views, let me state what facts in this case are undisputed. On the 11th of August, 1873, John C. Shaffer, being largely in debt, made a general assignment to the plaintiffs, Charles W. Deyo and William Dolson, for the benefit of his creditors, the creditors sharing alike, and no creditor having priority, one over the other. On the thirteenth of August (being two days after that date) the hotel (which property passed to the assignees by the general assignment) together with the personal property, was leased to Mrs. Shaffer until the following spring at fifty dollars per month, she agreeing to quit whenever the property was sold. On the 11th of August, 1873, Freer commenced an action to recover, and recovered judgment upon a note which Shaffer had given to him upon the purchase of a pair of horses, and such proceedings were had in that action that, on the 3d of September, 1873, he recovered a judgment for $299.57. On the same day an execution was issued upon the judgment, and on the same day a levy was made upon the pair of horses which

had been previously sold by Freer to Shaffer, and the horses were, in fact, sold on the 12th day of September, 1873. The present plaintiffs began this action, I assume, sometime in September, 1873 —

Mr. FIERO — September ninth.

The COURT — September 9, 1873. Bankruptcy proceedings were commenced by Atkins, one of the creditors of John C. Shaffer, in the United States district court for the southern district of New York, sometime in October, 1873 —

Judge SCHOONMAKER — October 11, 1873.

The COURT — The 11th of October, 1873. After, therefore, the levy had been made upon the property under the execution of Freer, a general assignee in bankruptcy was appointed in those bankruptcy proceedings some time during the year 1874. The general assignee in bankruptcy, Daniel W. Guernsey, was appointed some time during the year 1874; the exact date does not become important —

Judge SCHOONMAKER — Twenty-second of January, 1874.

The COURT — The plaintiffs in this action, on the 11th day of August, 1874, under their hands and seals, executed to Daniel W. Guernsey a paper writing, which is entitled "district court of United States for the southern district of New York. In the matter of John C. Shaffer, bankrupt, in bankruptcy, southern district of New York, to wit." It recites the making of the assignment to Deyo and Dolson by Shaffer, August, 11, 1873, and also recites the commencement of the proceedings in bankruptcy and the appointment of Guernsey as general assignee, and then it declares: "And whereas said assignee has entered into and is in full possession of the said property, and has made application to this court for its order authorizing and directing him to sell the same, therefore, in consideration of one dollar, and in order that a purchaser or purchasers of such property, or any part thereof, on a sale by said assignee, may receive such benefit, if any, which we, as such assignees, have in or to said property, if any part thereof, they stipulate and agree to unite with the assignee

in bankruptcy, as such assignees, in the conveyance or conveyances, if more than one, to the purchaser or purchasers of such property on a sale thereof by the assignee in bankruptcy." The paper seems to be a full recognition of the regularity of the proceedings in the bankruptcy court, and a full recognition of the fact that he was adjudged a bankrupt, and a full recognition of the fact that the assignee in bankruptcy took the title which the general assignees had acquired by the assignment. These are the facts of the case as I understand them to be.

I was at first inclined to send this case to the jury upon the question of actual fraud in the assignment, for we have spent some time in trying that issue (and I would like very much to have the verdict of the jury upon that issue); but even should I do that, and if I should then set aside the verdict because the action could not be maintained, and the court above should sustain my ruling, the action would still have to come back for a retrial. It could only be got clear of by a new proceeding in this court, and the saving of expense which I hoped to get by adopting that practice I would not succeed in getting. I think it is better, therefore, that I should dispose of this whole case upon the questions of law in it, and if I am wrong, the question of fact can afterwards be disposed of, and if I am right, that ends the case forever.

I ought to say, before disposing of these questions of law, that upon the issue of fraud I have no doubt in the case whatsoever (I had none upon the previous trial; I have not any now), though, as it is a question of fact, and made so by the statute, I would be compelled to submit it as a question of fact to the jury, unless I dispose of the case upon the other ground. But as I intend to dispose of this case upon the other ground, there can be no impropriety in my stating that I do not think the evidence would be sufficient to justify a verdict in favor of the defendant upon the ground of actual fraud, and these are, in short, my reasons for it: The assignment

was general. It was in favor of all creditors, share and share alike. No one creditor could attain any priority over the other under the assignment, provided the assignment was honestly executed and enforced. I know it is urged, from the fact or circumstance of the lease which was made to the wife, the jury would be justifiable in drawing the inference that the whole assignment was made for the purpose of securing some benefit to Shaffer. The wife has as good a right under the laws, as they now stand, to make a bargain for herself as any other person, the same as a *feme sole* or a male. I do not think the mere circumstance of the lease being made to the wife would justify the jury in finding actual fraud. That property was in the hands of the assignees, and it had to be disposed of to the best advantage for the creditors. By the lease they would secure a present revenue or income from the property, and as they were unprepared at that time to sell, having no customer, it was kept from depreciation pending that sale. In addition to that, we have the positive testimony of Shaffer and Deyo and Dolson that there was no fraud intended, only an honest distribution of the property among the several creditors. There could be really no fraud intended in the making of the assignment, unless the assignees had been, more or less, parties to the fraud; and when two men, of the character and standing of Deyo and Dolson, swear so positively as they do that this was done in good faith, I believe their statements, and I believe that this assignment was made with the honest intent of making a fair and just distribution of the property among creditors; and I have no doubt it would have been far better for all parties if all parties had acquiesced in allowing the assignees to dispose of the property and execute their trusts.

I have now given my views upon the question or issue of fraud. Can this action be maintained under the facts which I have stated? Now, I understand the following principles have been settled: It has been held that a general assignment for creditors, without giving priority, is superseded by pro-

ceedings in bankruptcy, and for the reason, where a person is insolvent and makes an assignment, it places the property beyond the power of the bankrupt court, if it stands; and as the policy of the bankrupt law is to leave the whole funds and all the property in the hands of the bankrupt court, any thing which takes it out of the power of the bankrupt act is fraud, in law, upon that court, and that judge BLATCHFORD also holds in a case to which my attention has been called. I will not refer to that case now. It has further been held, and held in a case in the supreme court of the United States, in *Wilson* agt. *City Bank* (17 *Wallace*, 473), that where a judgment is recovered by a creditor in the ordinary course of practice of the courts, and without collusion between the creditor and debtor for the purpose of giving such creditor priority over others, that that judgment, and the levy under it, is good, even as against an assignee in bankruptcy subsequently appointed. Now, apply those principles to this case, without any regard now to this decision that judge BLATCHFORD has made, and how does this case stand? You can't recover as general assignees; why? Because the proceedings in bankruptcy adjudge them totally void *ab initio*. They relate back to the actual assignment, so that you have no standing in court under your assignment. You can't recover for the benefit of the assignee in bankruptcy, simply and only because the general assignee in bankruptcy does not take priority over the judgment and execution creditor. And I may say, in passing, that, from the circumstances of this case, no one would hold that the recovery of Freer was by collusion with Shaffer for the purpose of giving him a priority; on the contrary, the express evidence of Shaffer is, that because he was pressed by Freer, and because he was pressed by others, he took the step which he did, and made the general assignment. The facts of this case, therefore, are clear that the recovery of Freer was not by collusion with the debtor for the purpose of giving Freer the priority; on the contrary, the judgment was recovered without col-

lusion with him, and according to the ordinary course of practice. For these reasons, therefore, I think this action cannot be maintained.

Now let me say a single word about the decision referred to, and a very recent one. It was made on the 9th of December, 1876, and within a month, in *McDonald, as Assignee*, agt. *William T. Moore and others*, and is reported in New York Weekly Digest of December 25, 1876, and therefore, of course, there can be no blame attached to the plaintiff's attorneys for bringing this action and seeking to maintain it, for the law under the bankruptcy act has always been more or less unsettled. In the case reported, the assignee in bankruptcy was before the court, the general assignee was before the court, and the creditor who had seized the property was before the court. These facts appeared: That, on the 28th of December, 1875, David Solinger, being insolvent, made a general assignment, under the laws of the state of New York, of all his property to the defendant, Mayer, in trust to pay his creditors, share and share alike. Mayer accepted the trust, and took possession of the property on the said day, and complied with the statute as to filing a bond and inventory. On the 4th of January, 1876 (that is, some six or seven days after the assignment) the defendants, Moore, Tingue & Co., recovered a judgment, in a state court, against Solinger for $1,508.38, and on the same day an execution was issued to the sheriff, who is a defendant in the suit, and placed in his hands.

On the 5th day of January, 1876, the next day after this, a petition in bankruptcy was filed, and plaintiff was chosen the general assignee in bankruptcy.

These were the claims of the parties: The plaintiff claims, in his bill, that he has a title to the property which was embraced in the assignment to Mayer, superior to the claims of Mayer and of Moore, Tingue & Co., and of the sheriff; that the assignment to Mayer was made in fraud of the bankrupt act, and that the property, or its proceeds, ought to go

to the plaintiff, as assignee in bankruptcy, free and clear of the claims of all the defendants.

Mayer, in his answer, expresses his willingness to relinquish his trust in favor of the plaintiff, on being paid his disbursements for counsel fees and other expenses in administering his trust, and his commission thereunder under his levy. You could scarcely conceive of a case more like the one here and the one before us.

Held, that the assignment to Mayer must be held to have been invalid as against the rights of the plaintiff under the bankruptcy act, although it was an assignment in trust for creditors, without preference. Now, why was it so? The court gives the reason: It was made when Solinger was insolvent, and it had the necessary result of preventing the property from coming to any assignee in bankruptcy of Solinger who should be appointed, and of preventing such property from being distributed under the bankruptcy act in any proceedings in bankruptcy instituted against Solinger, and therefore it must be held to have been made by Solinger with such view. Mayer had reasonable cause to believe Solinger to be insolvent, and must be held to have known that Solinger made the assignment with such view, because he must be held to the knowledge that the making of the assignment would have the necessary result above mentioned. A general assignment in trust for creditors, without preference, under a state law, is void under the bankruptcy act (*Globe Ins. Co.* agt. *The Cleveland Ins. Co.*, 14 *N. B. R.*, 311).

It was further held, that "when the assignment be set aside, it becomes void from the time it was made, against all persons who, after the time it was made, took steps to acquire rights against the property embraced in it as still the property of Solinger, and who, but for the obtainment of the assignment, would have secured and enjoyed such rights free from any obstruction. Such rights arrange themselves in order according to their priorities in point of time.

"As between Moore, Tingue & Co. and Solinger, the exe-

cution of the former bound the goods of the latter from the time the execution was placed in the hands of the sheriff. The assignee in bankruptcy acquired no rights in that respect as against Moore, Tingue & Co. which Solinger did not possess. The assignee in bankruptcy does not occupy a position of *bona fide* purchaser."

It seems to me that this case is directly decisive of the question before us. This case, as I had occasion to remark before dinner, seems to be about like this: Suppose this whole question were before the bankruptcy court, all the parties being before it, and the claim was as between these three parties, who was entitled to the property? Are the general assignees, who are the plaintiffs in this action, entitled to it by virtue of the general assignment? Is the general assignee in bankruptcy entitled to it by virtue of the assignment made in the bankruptcy court? Or is the defendant (the sheriff) entitled to it under the execution? In just precisely that case, with all those parties before the bankruptcy court, judge BLATCHFORD held that the sheriff was entitled to the property. That is this case exactly. As the action, then, cannot be maintained by you as plaintiffs for your benefit, because the bankruptcy proceedings set aside your assignment from the beginning, as you can't maintain the action in behalf of the general assignee in bankruptcy, because the recovery by Freer was without collusion with Shaffer to give him a priority, Freer is entitled to the priority which his levy gave.

I think it is better, with that express case before me, to hold in conformity with it; and if I am wrong, why, of course, it is very easy to correct me. If you wish to do so, I will put the cause in a shape where you can go to the general term without giving any security —

Mr. FIERO — I desire it put in that form. I except to your honor's ruling, and I ask to go to the jury upon the question of fraud, and then to go to the general term in the first instance; also, sixty days' time.

The COURT — Yes, sir; I repeat, if I was not against you upon the legal questions which this case involves, I should send it to the jury upon the question of fact; and whilst I should leave it to the jury to say whether there was or was not actual fraud, I should do so (where there has been one previous disagreement of the jury), with a pretty clear expression of my own judgment that there is no actual fraud in the case. As I said before, what was law under this bankruptcy act has always been very doubtful to the profession, and this decision which has recently been made, upon which I base my decision, was only made on the ninth of December last, a month and two days ago. Of course, the law was not so settled when this action was began and continued. It is due to counsel that I should make that statement.

NEW YORK COMMON PLEAS.

PAULINE OBERWARTH agt. JAMES MCLEAN and H. H. STOTESBURY.

The rights and powers of marshals to execute process on judgments in which transcripts have been filed.

After the filing of a transcript and docketing of a judgment obtained in the marine court of the city of New York, in the office of the clerk of the city and county of New York, the judgment can only be enforced as a judgment of the court of common pleas.

The judgment creditor may, before filing a transcript, issue an execution out of the marine court to a marshal, and after such execution is returned wholly or partly unsatisfied, or after sale thereunder, he may file his transcript and issue execution to the sheriff.

But he cannot issue execution to a marshal after the transcript is filed, because the judgment is then enforceable only in the same manner as judgments of the common pleas.

The right to an execution out of the marine court on a judgment obtained in that court is immediate, but the judgment creditor must make his election, and if he file a transcript of his judgment with the county clerk, his election is made; the law declares that thereupon his judgment shall be enforced in the same manner as judgments of the court of common pleas (*act of* 1872, *chap.* 629, *sec.* 8). This mode of enforcement is exclusive.

General Term, March, 1877.

ACTION for unlawful taking and conversion of plaintiff's goods. The facts of the case appear fully in the opinion.

Blumenstiel & Ascher, for plaintiff.

Reed & Drake, for defendants.

Oberwarth agt. McLean.

J. F. DALY, *J.*— The defendants, who were copartners, obtained a judgment for $290.70 against J. L. Oberwarth, the plaintiff's husband, in the marine court of the city of New York, on February 13, 1874. On the same day a transcript of the judgment was filed and the judgment docketed in the office of the clerk of the city and county of New York. On the same day an execution was issued out of the marine court directed to one of the marshals of the city of New York, directing him to levy on the property of the judgment debtor to satisfy said judgment. Whether such execution was issued before the filing of the transcript with the county clerk does not appear. It does appear that the judgment was perfected in the marine court at 10.45 o'clock A. M., and the transcript was filed and judgment docketed in the county clerk's office at 11.30 A. M.

This action was brought to recover damages for the seizure and sale of property alleged to belong to plaintiff, under that execution, by the marshal. Defendants attempted to justify under that execution and judgment, and to show that the judgment debtor had an interest subject to levy and sale in the property seized.

The court held, that the transcript having been filed and judgment having been docketed in the county clerk's office, the judgment could only be enforced as a judgment of the court of common pleas (*act of* 1872, *chap.* 629, *sec.* 8), and that the execution out of the marine court did not protect the marshal or his indemnitors, these defendants; that the plaintiff was in possession of the goods seized at the time of seizure and was entitled to recover, and left only the question of damages to the jury. A verdict for $1,731 for plaintiff was given, and judgment thereon was entered against defendants.

It can hardly make any difference whether the execution to the marshal was issued before or after the filing of the transcript, since the sale of plaintiff's property under it did not take place until afterwards.

If the judgment creditor had the right, after the passage of the act of 1872 (*supra*), to enforce his judgment, either by execution to a marshal issuing out of the marine court, or by execution to the sheriff issuing out of the court of common pleas, these remedies were not concurrent, for although the execution to the marshal would reach personal property only, yet the execution to the sheriff reaches both personal and real property, and there could not possibly be an intention in the law that the two executions should issue at the same time. The right to the execution out of the marine court was immediate, but he was to make his election, and if he file a transcript of his judgment with the county court his election is made; the law declares that thereupon his judgment shall be enforced in the same manner as judgments of the court of common pleas (*act of* 1872, *supra*), and we have held this mode of enforcement to be exclusive (*Leland* agt. *Smith*, 11 *Abb.* [*N. S.*], 231; *Ex parte Lippman*, 48 *How.*, 359; *see as to similar provisions of law respecting judgments of district courts of the city of New York*, *Martin* agt. *Mayer*, 12 *Abb.*, 243). This election is operative although he may have already issued an execution out of the marine court, operative as to all subsequent proceedings to enforce the judgment. Thus, the judgment creditor might, before filing a transcript, have issued an execution out of the marine court, under which the marshal acted, and after such execution was returned wholly or partly unsatisfied, or after sale thereunder, he might file his transcript and issue execution to the sheriff. But he could not issue execution to the marshall after the transcript was filed, because the judgment is then enforceable only in the same manner as judgments of the common pleas, and for the same reason the marshal could proceed no further upon an execution issued prior to such filing, for that would be, in effect, proceeding to enforce by execution out of the marine court to a marshal a judgment enforceable exclusively by execution out of the common pleas to the sheriff. As the plaintiff has the right, in the

first place, to go on with his execution in the marine court, or to enlarge his power of enforcing his right by taking a step provided by the statute, his doing the latter, *i. e.*, filing the transcript, must be held to supersede or be an abandonment of his right to the execution in the marine court, and of such execution if issued; and whatever there remained to be done by way of levy or sale under such execution, if issued, the filing of the transcript took from the plaintiffs the right to authorize. The marshal, if proceeding in ignorance of the fact that a transcript had been filed, might be protected as to his subsequent acts under it, but the plaintiffs, on whose behalf the transcript was filed, or other persons knowing the fact, would be liable for directing or authorizing the marshal to proceed.

As to the plaintiff's possession of the goods taken being undisputed, it is sufficient that they were in a store claimed by plaintiff as her own, and were taken from the store. The question as to whether she or her husband was the owner of the store relates to the title, with which the wrong-doer has nothing to do, if he have, as in this case, no sufficient process to justify him.

The judgment should be affirmed, with costs.

NEW YORK SUPERIOR COURT.

HENRY ROUSSEL, respondent, agt. THE ST. NICHOLAS INSURANCE COMPANY OF THE CITY OF NEW YORK, appellant.

Complaint — Parties.

Where a policy of insurance by its terms makes the loss payable to a mortgagee named, of the property insured, he may maintain an action in his own name for such loss.

In such case it is not necessary to join those who were in actual possession of the property at the time of such insurance, and in whose name the policy was obtained, although they were the owners of the property subject to the interest of the mortgagee.

A mortgagee of property has an insurable interest in it, and where the complaint expressly avers such interest to have existed at the time of effecting the insurance, the legal presumption is that such interest continued until the time of the loss. It is unnecessary to aver in the complaint the existence of an insurable interest at the time of the loss, as what is necessarily implied need not be in terms alleged.

The misuse of a word which is manifestly a mere orthographical error, by which the party has not been misled, does not render pleadings demurrable. Such mistakes may be corrected at any time, and should be disregarded.

General Term, April, 1876.

THIS is an appeal from an order, made at special term December 6, 1875, overruling a demurrer to the complaint. The action is upon a policy of fire insurance, made by defendant on the 15th day of March, 1875, whereby it agreed to make good any loss or damage by fire to the amount of $2,500 on the steam tug propeller Matt. White, during the period of one year.

The complaint avers: that said policy of insurance made

such loss or damage payable to Henry Roussel, this plaintiff, and was obtained in the names of S. W. Morris and A. C. Lewis; that the consideration for said policy was paid by Henry Roussel, this plaintiff, as was well known to the defendant when said sum was accepted by it.

That, at the time aforesaid, this plaintiff held a chattel mortgage on said property, to secure a payment of $2,500 due from the owners of said property to this plaintiff, which chattel mortgage was at that time overdue, and by the terms of which mortgage this plaintiff was entitled to the immediate possession of said property, and this defendant gave the policy of insurance as aforesaid on said property with the intention to secure against loss or damage by fire, to the extent of $2,500, the interest which this plaintiff held in such property as aforesaid, the fact of such interest to this plaintiff in said property being well known to the defendant.

That, at the time of such insurance, S. W. Morris and A. C. Lewis, aforesaid, were in actual possession of the property thus insured, and were the owners of the same, subject to the plaintiff's interest as mortgagee as aforesaid; that is to say, the said Morris and Lewis had the right of redeeming said property, and obtaining undisputed ownership of the same, upon payment of the sum aforesaid, due as aforesaid to this plaintiff.

That, on the 20th day of June, 1875, a fire occurred by which the property thus insured was destroyed, and a loss incurred to an amount exceeding the sum aforesaid of $2,500, to wit, to an amount of at least $3,055.

That said fire originated about 12 o'clock, midnight, on said 20th day of June, 1875, while said boat was lying in the harbor of New York, and that said fire was not caused by any of the accepted (*sic.*) risks in said policy contained.

That immediately after the aforesaid fire and loss, the defendant was duly notified of the same, and soon thereafter, and more than sixty days before the commencement of this action, formal proof of loss was delivered to and left with

the defendant, both by and in behalf of the said Morris and Lewis, and by and in behalf of this plaintiff.

That the defendant has refused, and still refuses, on its part to perform the conditions in said contract of insurance.

That the full sum of $2,500, as aforesaid, remains due and unpaid.

The defendant demurred on the ground: (1) That plaintiff had not legal capacity to sue. (2) That there was a defect of parties in the omission of the names of S. W. Morris and A. C. Lewis, the parties insured. (3) That the complaint does not contain facts sufficient to constitute a cause of action.

The court at special term overruled the demurrer and ordered judgment for the plaintiff, with costs, but with leave to the defendant to withdraw the demurrer and put in an answer, within twenty days, on payment of costs.

John Hewitt, for appellant.

Edward D. McCarthy, for respondent.

SANFORD, *J.* — As mortgagee of the steam-tug, the plaintiff had an insurable interest in her (*Phil. on Ins.*, 41, 64; *Traders' Ins. Co.* agt. *Roberts*, 9 *Wend.*, 404). The complaint expressly avers such interest to have existed at the time of effecting the insurance. The legal presumption is, that such interest continued until the time of the loss (*Bank of Auburn* agt. *Roberts*, 44 *N. Y.*, 192). But the defendant insists that the complaint should have averred the existence of an insurable interest at the time of the loss, and that the absence of an express averment to that effect cannot be aided by inference or intendment, nor by presumptions or conclusions of law. The rule, however, is well settled, that what is necessarily implied need not be in terms alleged.

The averment of the plaintiff's lien, and that defendants gave the policy on the property with the intention to secure against loss the interest which plaintiff held in such property (the fact of such interest being well known to defendant), is

admitted by the demurrer. If denied, it would be sustained by the production and proof of the mortgage and policy, and such proof would throw upon the defendant the burden of showing that the plaintiff's interest had ceased at the time of loss.

Whatever must be proved should be averred, but the averment, while it should be commensurate with, need not exceed the required proof.

The action was well brought by the plaintiff in his own name. He was the real party in interest (*Code, sec.* 3).

At common law, if an instrument be not under seal, the party for whose sole benefit it is evidently made may maintain his action thereon, in his own name, although the engagement be not directly to or with him (1 *Chitty's Pl.*, 5; *Schermerhorn* agt. *Vanderheyden*, 1 *J. R.*, 139). In *Evins* agt. *Harmony Fire Insurance Company* (3 *Bosw.*, 517), it was held that the owner of the equity of redemption could not recover upon a similar policy, while the mortgagee remained unpaid, and for the reason that the mortgagee had the absolute right to recover the loss.

In contemplation of law there is created a privity of contract between the promisor and the party who alone has a beneficial interest in the performance of the promise.

Morris and Lewis are not necessary parties to the action.

The controversy between the parties before the court can be determined without prejudice to any rights of theirs, and a complete determination of the controversy can be had without their presence (*Code, sec.* 122).

The misuse of the word "accepted" for "excepted," in the allegation that the fire was not caused by any of the accepted risks, is manifestly a mere orthographical error, by which defendants have not been misled. Such mistakes may be corrected at any time, and should be disregarded. They do not render pleadings demurable.

The order appealed from should be affirmed, with costs.

Curtis, J., concurring.

NEW YORK COMMON PLEAS.

William L. Gardner agt. Mr. Kraft.

Fictitious name.

A plaintiff is not allowed to use a fictitious name for the defendant at his discretion, but only when he is ignorant of the true name.

If the name of the defendant be unknown he may be sued by a fictitious name; but if a fictitious name is adopted in the summons or in the complaint (if one accompany the summons), there must be a distinct allegation to the effect that the name so used is by reason of ignorance of the defendant's true name.

A person sued as Mr. Kraft, in the district court, did not appear, and judgment was recovered by default, which was assumed to have been made a judgment of the common pleas, by the filing of a transcript with the county clerk. On application for an order in supplementary proceedings on the judgment,

Held, that the judgment was void, and not one upon which any final process could lawfully be issued against the property or person of the person so served.

Special Term, February, 1877.

James K. Averill, for plaintiff.

Robinson, *J.* — Application is made by the plaintiff for an an order in supplementary proceedings against Mr. Kraft, on a judgment recovered by him in the district court of the third judicial district of this city against some male person whose surname is "Kraft," assumed to have been made a judgment of this court by the filing of a transcript with the county clerk. So far as appears from the affidavit presented, and as is conceded by plaintiff's counsel, the person sued as Mr. Kraft did not

appear and judgment was recorded by default. I am of the opinion the judgment was void, and is not one upon which any final process could lawfully be issued against the property or person of the person so served. The rule of the common law well establishes the principle that any proceeding in a court against a party defendant must be instituted against him as well in his true surname as in his christian name. If sued by an erroneous name in either respect, he is not bound to appear; and if he omits to do so the judgment cannot be enforced against him (*Cole* agt. *Hindson*, 6 *T. R.*, 243; *Shadgett* agt. *Clipson*, 8 *East.*, 238; *Wilks* agt. *Lock*, 2 *Taunt*, 400; *Scandover* agt. *Warne*, 2 *Camp.*, 270; *Morgan* agt. *Bridges*, 1 *Barn. & Ald.*, 647; *Crawford* agt. *Snatch*, 2 *Strange*, 1218; *Walter* agt. *M'Connell*, 13 *Ad. & Ell.*, 903; *Kelly* agt. *Lawrence*, 3 *Hurl. & Colt.*, 1; *Griswold* agt. *Sedgwick*, 6 *Cow.*, 456; *Hoffman* agt. *Fish*, 18 *Abb.*, 76; *Farnham* agt. *Hildreth*, 32 *Barb.*, 277; *Frank* agt. *Levic*, 5 *Rob.*, 520; *Moulton* agt. *De McCarthy*, 6 *id.*, 470). To relieve the difficulty of obtaining the true name of the defendants, if unknown, section 175 of the Code, as well as the twelfth section of the district court act, laws of 1857, chapter 344, provide that, if the name of the defendant be unknown, he may be sued by a fictitious name. But the deviation from the common-law rule, thus allowed, must be strictly pursued; and if a fictitious name is adopted in the summons or in the complaint, if one accompany the summons, there must be a distinct allegation to the effect that the name so sued is by reason of ignorance of the defendant's true name (*Crandall* agt. *Beach*, 7 *How. Pr.*, 271). Section 173 of the Code gives courts of record full power before or after judgment, or on the trial, in furtherance of justice, to correct such a mistake in the name of the party; but this section is not found adopted by the district court act without the limitation indicated in *Crandall* agt. *Beach* (*supra*), and the correction as to the name of a party as thus allowed, the beneficial purposes of sections 173 and 175 would be without efficacy

and supererogatory, since, otherwise, full license would be given without reason, existing or assigned, for a person being sued and execution had against him or his property in any other name than his own.

This court, at general term, in *McCabe* agt. *Doe* (2 *E. D. Smith*, 64), held that a judgment of the marine court (then a justice's court) against "John Doe," owner of the steamship "Sarah Sands," was void as against William C. Thompson, the person served with process, because his name was not inserted by any amendment in the proceedings, although he appeared and was held to have a right of appeal.

For these reasons I hold the judgment void, and no such proceedings can be had upon it as asked for. Application denied.

GREENE COUNTY OYER AND TERMINER.

The People agt. Elsie Hallenbeck.

Demurrer to indictment for uttering, writing and publishing a lewd and indecent paper.

The general rule of pleading is that the indictment must apprise a party of the crime whereof he or she is accused.

An indictment for uttering, writing and publishing a lewd and indecent paper was in the following language, viz.: "Did utter, write and publish a certain obscene, lewd and indecent paper and writing, which said paper was inclosed in a sealed envelope and deposited in the post-office of the United States, at said town of Catskill, for mailing and delivery; the said envelope being then and there addressed by the words following, that is to say, 'Mrs. Mary T. Westmore, Catskill, N. Y.'"

Held, that the indictment could not be upheld. There should be some *general description* of the writing. It is not necessary to copy the paper or minutely describe the print, but it is necessary to give a *general description* thereof and to aver their evil tendency; sufficient information should be suggested to put the defendant on inquiry as to her defense and the *subject* of the obscenity should be stated.

December Term, 1877.

Demurrer to two indictments.

James B. Olney, for prisoner.

A. C. Griswold, district attorney, for people.

Westbrook, *J.* — The same question arises upon the two indictments against the defendant above named. They are both for uttering, writing and publishing a lewd and indecent paper, and they are both demurred to because, as the pleader claims, the indecent writing is not sufficiently described. The

language of the one indictment is, and the other is similar, "did utter, write and publish a certain obscene, lewd and indecent paper, and writing, which said paper was inclosed in a sealed envelope and deposited in the post-office of the United States, at said town of Catskill, for mailing and delivery, the said envelope being then and there addressed by the words following, that is to say, 'Mrs. Mary T. Westmore, Catskill, N. Y.'"

The general rule of pleading is, that the indictment must apprise a party of the crime whereof he or she is accused. The rule is universal, except that it is so far modified when the charge is for uttering or publishing obscene literature, it is unnecessary "to set out the obscene language *in full;* it is enough to aver the fact of the obscenity of the writing, and to give this as an excuse for not setting it forth" (2 *Wharton's Criminal Law*, § 2547 [*7th ed.*]). But it has never been held, so far as my research extends, that no *general description* of the writing was necessary.

In *Commonwealth* agt. *Sharpless* (2 *Sergeant & Rawle*, 92), the indictment did generally describe the picture, for exhibiting which the defendants were indicted, by the words, "*A certain lewd, wicked, scandalous, infamous and obscene painting, representing a man in an obscene, imprudent and indecent posture with a woman.*" That indictment was properly sustained.

In *Commonwealth* agt. *Holmes* (17 *Mass.*, 336), the court held: "In an indictment for publishing an obscene book or print, it is sufficient to give a *general description* thereof, and to aver their evil tending, without *copying* the book, or *minutely* describing the print."

In *The State of Vermont* agt. *Brown* (1 *Williams*, 619), it was held: "An indictment for selling an obscene book, or printed paper, should ordinarily set forth the book or paper *in hæc verba*, as in indictments for libel or forgery, but this may be dispensed with, and the obscene character of the publication be described in *more general terms*, if it be of so

gross a character that spreading it upon the record would be an offense against decency." In that case the writings were described by their titles.

In *People* agt. *Girardin* (1 *Manning*, 90, *a Michigan case*), the publication was of obscene matter in a newspaper, and the title of the paper was given.

In the case before us there is no description whatever of the alleged libellous writing. It is only averred that it was contained in an envelope directed in a particular manner. No information is suggested which can put the defendant on inquiry as to her defense, nor to what *subject* the obscenity related. In *Knowles* agt. *The State of Connecticut* (3 *Day*, 103), the indictment was for the exhibition of a "monster, highly indecent and improper to be seen, or to be exposed as a show." Of such an indictment the court unanimously said: "This information alleges that said Knowles exhibited a horrid and unnatural monster, highly indecent, unseemly and improper to be seen, or exposed as a show; but states no circumstances in the description of its appearance, which shows this allegation to be true; it cannot be supported, either at common law or on the statute."

It may be observed that in the case cited there was very much more information given to the defendant than in these before us. He was called upon to defend the character of an exhibition he was making, and that disclosed to him the alleged obscenity. In these the party is asked to recall every letter written to a particular individual and prepare for an attack which may be made upon any of the correspondence. Not the slightest thing is mentioned by date, subject-matter, expression, thought or word which identifies or describes the alleged obscene writing. There is, in short, no description whatever. Within any rule or case, which I have seen, these indictments cannot be upheld.

The defendant is entitled to judgment upon both indictments. The rule will be entered as of the day of the argument.

SUPREME COURT.

EDGAR SMART and another agt. STATE S. HARRING and others.

Fraudulent conveyance.

Where a debtor, with the intent on his part of defrauding his creditors, executes a conveyance of his property to his wife, without any valuable consideration being paid by the grantee, the conveyance will be set aside as fraudulent as against such creditors.

And this is so, although the wife received the conveyance without knowledge of such fraudulent intention on the part of the husband.

Where the evidence showed that the wife parted with nothing of value, save the effect which the giving of a certain mortgage, which she executed in conjunction with her husband, might have upon her dower interest in the property, provided she survived her husband:

Held, that the facts did not establish a valuable and adequate consideration, legal or equitable, in favor of the wife, so as to present a case which would entitle her to protection, although the jury found that she had no knowledge of her husband's fraudulent intent.

Rensselaer Circuit and Special Term, February, 1877.

MOTION to set aside a conveyance as fraudulent.

The plaintiffs, as copartners in the gas-fitting and plumbing business in Troy, on the 19th day of December, 1874, recovered a judgment against the defendant, State S. Harring, for the sum of $351.71, upon a note given for work, labor and services performed, and materials furnished by them, in fitting out the defendant Harring's boat, to be propelled by steam. The most of the work was done, and the materials were furnished by the plaintiffs prior to the 31st day of July, 1874, although the said note was not dated or given until August 18, 1874.

On the 31st day of July, 1874, the said defendant Harring

was the owner of a house and lot on North Third street, in the city of Troy, of the value of $10,000, subject to incumbrances to the amount of $5,800, being two mortgages, viz., one for $1,800, and the other for $4,000. On the said thirty-first of July, said Harring conveyed to George S. Dexter, by deed dated July 1st, 1874, the said real estate, and said Dexter conveyed the same on the same day to Anna M. Harring, the wife of State S. Harring.

The defendant Anna M. Harring defended upon the ground that the conveyance was made to her pursuant to an understanding and agreement between herself and her husband prior to the giving of the $4,000 mortgage upon the premises, that if she would join with him in the execution of the mortgage, which was to be executed for the purpose of raising money for the husband to put into the boat before mentioned, he (Harring) would thereafter convey to her all the rest of his title in the real estate. This inchoate right of dower in the $4,000 mortgage was all the consideration which was sought to be proven on the part of the wife for the conveyances aforesaid.

Upon the trial these two questions were put to the jury by the court, viz.:

1. Was the conveyance to Anna M. Harring made with intent, by State S. Harring, to hinder, delay or defraud the creditors of State S. Harring?

To which the jury answered, "yes."

2. Did Anna M. Harring receive the said conveyance with knowledge of such intent on the part of said State S. Harring?

To which the jury answered, "no."

L. W. Rhodes, for plaintiff.

H. A. Merritt, for defendants.

INGALLS, *J.*— The jury has found that the conveyance by Harring to his wife was made with intent on his part to

hinder, delay and defraud his creditors, and that his wife received such conveyance without knowledge of such fraudulent intention on the part of her husband. The evidence shows that the wife parted with nothing of value, save the effect which the giving of the mortgage, which she executed in conjunction with her husband, might have upon her dower interest in the property, provided she survived her husband. The improvements upon the land were made with money furnished by the husband. Under the circumstances of the case, I do not think her want of knowledge of her husband's fraudulent intent to defraud his creditors is sufficient to place the property beyond the reach of the creditor whose debt had, in part at least, accrued when the conveyance was executed (*Mohawk Bank* agt. *Atwater*, 2 *Paige*, 59). In that case the chancellor remarks: "If the father committed a fraud upon his creditors by giving away property which should have been reserved for them, the grantee, without valuable considertion, cannot be protected, although he was not privy to the fraud" (*See, also, Holmes* agt. *Clark*, 48 *Barb.*, 237; *Case* agt. *Phelps*, 39 *N. Y.*, 164; *Savage* agt. *Murphy*, 34 *id.*, 508; *Carpenter* agt. *Roe*, 10 *id.*, 228). A voluntary conveyance can be sustained upon the ground that the grantor has reserved property sufficient to pay his debts, only in a case where the conveyance is in good faith, and without intent to defraud creditors (*Fox* agt. *Moyer*, 54 *N. Y.*, 126; *Pendleton* agt. *Hughes*, 65 *Barb.*, 136).

I am aware that it has been held that a voluntary conveyance by husband to wife is not necessarily or presumptively fraudulent as against creditors, and that the want of consideration is but a circumstance to be considered, with all the other facts, in determining whether the conveyance should be pronounced fraudulent (*Holen* agt. *Burnham*, 63 *N. Y.*, 74).

The fact standing alone that the conveyance was voluntary, without any other circumstances, would not be sufficient to justify declaring it fraudulent as against creditors. A fraudulent intent must be shown, and that must be established as a

question of fact, and the want of consideration is an ingredient (*Babcock* agt. *Eckler*, 24 *N. Y.*, 632).

In the case above cited (*Holden* agt. *Burnham*), the learned judge remarks: "The action is founded upon the allegation that the conveyance by Mr. Burnham was made with intent to hinder, delay and defraud his creditors; there is no finding upon this question, or any request to find upon it."

In the case we are considering, the fraud of the husband is found by the jury, and the facts are such that his wife cannot be exempted from the consequence of such fraud. If the facts established a valuable and adequate consideration, legal or equitable, in favor of the wife, a case would be presented which would entitle her to protection, the jury having found that she had no knowlenge of her husband's fraudulent intent. But, upon the facts established, the plaintiffs are entitled to a preference, and judgment must be entered accordingly, with costs.

NEW YORK SUPERIOR COURT.

GEORGE J. CLAN RENALD agt. JOHN A. WYCKOFF.

Assignment — power to compel judgment debtor to execute an assignment of his interest in letters patent to a receiver.

The Code confers ample power, even upon a county judge, to compel a judgment debtor to apply his property to the payment of a judgment against him, and, if necessary, to execute a conveyance thereof, whether it be within or without the state, in accordance with the practice existing at the time of the passage of the Code. The same reasoning applies alike to real and personal property, and hence includes letters patent.

The superior court of the city of New York possesses not only all the authority specifically conferred by the sections of the Code relating to proceedings supplementary to execution, but also the same inherent equity powers and jurisdiction which are possessed by the supreme court for that purpose; therefore, the power to compel a judgment debtor to execute and deliver to a receiver an assignment of his interest in letters patent *seems* to be ample.

Special Term, March, 1877.

MOTION by a receiver to compel a judgment debtor to execute letters patent.

FREEDMAN, *J.* — The judgment debtor insists that letters patent are personal property, and that neither the court, nor any judge thereof, has jurisdiction to order an assignment of personal property. In *Porter* agt. *Williams* (5 *How.*, 441) and *Bostwick* agt. *Menck* (40 *N. Y.*, 383) it was simply decided that an assignment to a receiver appointed in supplementary proceedings under the Code is not necessary to pass the title of the judgment debtor to personal property, but

that the legal title to such property becomes vested in the receiver by virtue of his appointment. The question of power to order an assignment, in case of necessity, was not considered. In the cases of *Ten Broeck* agt. *Sloo* (13 *How.*, 28) and *Ball* agt. *Goodenough et al.* (37 *How.*, 479), it is true, it was said that such an assignment cannot be compelled. But in neither case was the question before the court, and hence the remark is *obiter*. In *Ten Broeck* agt. *Sloo* a receiver was appointed of the debtor's annuity, and of his rights under a certain contract in process of enforcement by suit, and the debtor moved to vacate the order of appointment on the ground that it was not a case for the appointment of a receiver, which motion was denied.

In *Ball* agt. *Goodenough et al.*, the defendant moved to vacate the order appointing a receiver on the sole ground that it was not made by the same judge who had granted the original order for the examination of the judgment debtor, and the motion was granted. This decision is erroneous, even as far as it goes, for the second section of chapter 276 of Laws of 1840, which is applicable to the court in which that case arose, expressly provides as follows: Section 2. "Whenever any proceeding shall be commenced by or before any judge of the said court, by virtue of any statute of this state, the same may be continued by or before any other judge of said court."

The only case which actually decides that an assignment of personal property cannot be compelled is *The People ex rel. Williams* agt. *Hulburt* (5 *How.*, 446), which is also reported in 1 *Code R.* (*N. S.*), 75, and 9 *New York Legal Observer*, 245. It arose in the year 1851. No authority is cited for the proposition laid down, and the court bases its decision solely on the ground that the Code makes no provision for an assignment. For this reason it was held that a county judge, being an officer of limited jurisdiction, possessed no authority to order an assignment of personal property, though an assignment under seal would be necessary to transfer the title to real estate to the receiver, and though the supreme court, by virtue of its

original and inherent power and authority, and especially since the accession of equity powers and jurisdiction, might order and compel an assignment of personal property without any statutory provisions.

Since that decision the court of appeals has held, in *Porter* agt. *Williams* (5 *Seld.*, 142), that since the Code the order of appointment of a receiver has the like effect upon the debtor's real estate as upon his personal estate, and that the whole property of the judgment debtor situate within the state becomes, by force of the order, vested in the receiver as soon as his appointment is completed. This is now the settled law of this state; and since the amendment of section 298 of the Code, passed in 1863, it is only necessary, in order to vest the title of the judgment debtor to real property in the receiver, that a certified copy of the order of his appointment shall be filed and recorded in the office of the clerk of the county in which such real estate is situated, and also in the office of the clerk of the county in which the judgment debtor resides.

In the subsequent case of *Fenner* agt. *Sanborn* (37 *Barb.*, 610) the supreme court (*Erie general term, May* 12, 1862) came to the conclusion that the Code confers ample power, even upon a county judge, to compel a judgment debtor to apply his property to the payment of a judgment against him, and, if necessary, to execute a conveyance thereof, whether it be within or without the state, in accordance with the practice existing at the time of the passage of the Code. This decision must be deemed to overrule the prior decision of the same court in *The People* agt. *Hulburt*, above referred to, upon the point now under consideration. Its reasoning applies alike to real and personal property, and hence includes letters patent.

A patent is a peculiar species of personal property, created by statutes of the United States, over which state courts have no direct control. The only way in which title to a patent can vest, is by an instrument in writing, so that it can be

recorded (*Potter* agt. *Holland*, 7 *Blatchf.*, 206). And under the patent laws of the United States, no patent, or any interest in a patent, can be assigned, except by an instrument in writing. In case of an assignment the thing to be assigned is not the mere parchment, but the monopoly conferred, and the right of property created by it. The same considerations which apply to real estate situated in other states, apply with almost equal force to letters patent, and as this court possesses not only all the authority specifically conferred by the sections of the Code relating to proceedings supplementary to execution, but also the same inherent equity powers and jurisdiction which are possessed by the supreme court for that purpose, the power to compel the judgment debtor to execute and deliver to the receiver an assignment of his interest in the letters patent in question, seems to be ample. I am also of the opinion that a proper case has been made out for the exercise of the power, for it is no answer to the application that such interest is not of great value at the present time.

The application is granted.

UNITED STATES CIRCUIT COURT.

In the matter of HENRY SCHWARTZ, bankrupt.

Bankruptcy — stay of suit brought in state court after filing of petition.

The bankrupt is entitled, until the question of his discharge is settled, to be protected by the court in bankruptcy, except in the cases specified in the bankrupt law. That the creditors have not proved their claim in the bankruptcy does not affect the question. Section 5106 of the Revised Statutes relates to debts provable, which, of course, includes those which have not been proved.

Where a claim originates in contract, although fraudulently induced, and is prosecuted in an action sounding in damages, it continues to constitute a provable debt, even though the fraud must be proved to entitle the plaintiff to a recovery.

THE bankrupt having filed a voluntary petition, Rothschild & Heyman, creditors, brought an action in the common pleas, seeking to recover a debt alleged to be fraudulently contracted. The complaint was based on the alleged fraud. On application of the bankrupt, the district court stayed the proceedings until the question of the discharge should be determined. A motion was then made to vacate the stay, which being denied, such decision was brought up for review to the circuit court. The counsel for petitioner contended that section 5106 did not apply to his case, as the claim in suit was one which could not be discharged in bankruptcy, and that under the pleadings the plaintiff must either prove the fraud or not recover

A. Blumensteil, for bankrupt.

A. R. Dyett, for creditor.

JOHNSON, *J.* — On the 4th of March, 1876, the district court decided an application made by the petitioners to vacate a stay of proceedings in a suit in a state court against the bankrupt, brought by them, and which had been stayed by an *ex parte* order of the district court on the 14th of February, 1876. The petitioners now apply to have this order of March 4, 1876, reversed, upon review in this court. The question involved the construction of section 5106 of the Revised Statutes. This section enacts "that no creditor, whose debt is provable, shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined."

It is contended, on the part of the petitioners, that, notwithstanding the generality of the language employed, which embraces every provable debt, it ought to be construed not to include any debt which, under the provisions of section 5117 of the Revised Statutes, would not be discharged, even though the bankrupt should obtain the statutory discharge. Debts of this class are designated in that section as those created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary capacity.

They further insist that the demand upon which this suit is brought against the bankrupt is not a provable debt. This latter proposition cannot, in my judgment, be maintained. Their statements of their own case shows that the claim originated in what, in form at least, was a contract for the purchase by the bankrupt, and the sale by them to him, of merchandise in the line of his business. The fact that he is charged with having fraudulently induced the petitioners to make the sale by false representations of his pecuniary affairs, does not exclude the claim from the class of provable debts. It is still the price that is claimed, under the name of damages, for the fraud. Even if their complaint in the state court is so framed that they cannot recover unless they prove

the fraud, according to the law of the state, it does not cease to be, in the language of the bankrupt act, a debt created by the fraud of the bankrupt. Had the action of the petitioners taken the form of an action for the recovery of the specific merchandise sold, founded upon a complete rescission of the contract, a different question would have been presented.

Where a claim originates in contracts, although fraudulently induced, and is prosecuted in an action sounding in damages, it continues to constitute a provable debt, even though the fraud must be proved to entitle the plaintiff to a recovery.

The question to be determined in this case is, therefore, the general one, whether, the debt being provable, the creditor is at liberty to proceed, upon the ground that debts which cannot be discharged are impliedly excepted from the provision of section 5106? This question has been fully discussed in several cases in the district courts (*In re Rosenberg*, 3 *Benedict*, 14; *In re Ghirardelli*, 1 *Sawyer*, 343). I concur entirely in the views presented by judge BLATCHFORD in the opinion in the first of the cases cited. The bankrupt is entitled, until the question of his discharge is settled, to be protected by the court in bankruptcy, except in the cases specified in the bankrupt law. That the creditors have not proved their claim in the bankruptcy does not affect the question. The section relates to debts provable, which, of course, includes those which have not been proved.

As the application of the petitioners to vacate the stay of proceedings followed so closely the granting of the stay, there cannot have been at that time any unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge. The adjudication of the defendant to be a bankrupt on his voluntary application was in December, 1875; his assignee was appointed February 10, 1876, and the application for a stay of proceedings immediately followed, as before stated. On this review the decision must have relation to the facts upon which the district court acted.

The order under review must be affirmed, and the clerk will certify to the district court that the order of that court in this matter, made March 4, 1876, refusing the application of the petitioners to vacate the stay of proceedings and injunction granted on the 14th of February, 1876, is affirmed.

NEW YORK SUPERIOR COURT.

JOHN RYALL, administrator, &c., plaintiff, agt. JAMES KENNEDY, defendant.

Arrest — execution against the person — when will be vacated.

The term, "injury to person," as used in section 179 of the Code, cannot be extended by judicial construction beyond injuries to the person of the *plaintiff*. An action for such an injury dies with the plaintiff.

An action brought by an administrator against the master of a vessel for negligently causing the death of his intestate, is not such an action as will authorize the arrest of the defendant.

It is not an action for an injury to the person of the *plaintiff*, but a statutory action founded upon the death of plaintiff's intestate. The statutes under which such actions are now maintainable provide for the recovery of pecuniary damages not exceeding $5,000, but give no remedy against the person of the defendant. They are in derogation of the common law, and hence their provisions cannot be extended and deemed to confer, by implication, a right of arrest, as long as their language is not fairly susceptible of such an interpretation.

THIS is a motion to set aside an execution issued against the person of the defendant.

The complaint in the action avers:

1. That the defendant was the master of the steamship City of Brussels.

2. That in March, 1871, the plaintiff's intestate, John Ryall, took passage in the said steamship from Liverpool to New York, and the master, for a good consideration, "undertook, promised and agreed to safely and securely convey and transport the intestate to the city of New York by the said steamship."

3. That the intestate then went on said vessel and proceeded on his voyage to New York.

4. That thereafter, and through the negligence and carelessness of the said defendant, the said master of said vessel, a tin drinking cup, used by emigrants, and which then contained poison, was allowed by such defendant, master aforesaid, to be placed and remain on or near the dining table in the cabin of said vessel, where John Ryall, jr., now deceased, took his meals, and through such carelessness and negligence of said defendant, master aforesaid of said vessel, the said John Ryall, jr., being then about five years of age, entered said cabin and took up said tin cup to drink, not knowing it contained poison, whereby he was instantly poisoned, and which resulted in his death, all of which was without the fault or negligence of said John Ryall, jr., or his parents, in whose charge he was.

The action was tried some years ago, and the complaint dismissed on the ground that the owners, and not the captain, were liable.

The plaintiff appealed to the general term of this court, where the judgment of dismissal was reversed and a new trial ordered.

The defendant appealed to the court of appeals, where the order was affirmed and, pursuant to the stipulation to be given in such appeals, judgment absolute ordered for plaintiff, with costs.

The proceedings were thereupon remitted to this court and the case sent to a sheriff's jury to assess the damages, which it did at $2,000.

Judgment thereupon was entered in the plaintiff's favor, and execution issued against defendant's property, which was returned *nulla bona*.

The plaintiff then issued an execution against the person of the defendant, upon which the defendant is now held in custody.

Salter & Cowing, attorneys for plaintiff.

Platt & Gerard, attorneys, and *John M. Bowers*, of counsel for defendant.

FREEDMAN, *J.* — Section 288 of the Code provides that if the action be one in which the defendant might have been arrested, as provided in sections 179 and 181, an execution against the person of the judgment debtor may be issued; but no such execution shall issue, unless an order of arrest has been served, as provided by the Code, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 179.

Under the decision in *Wood* agt. *Henry* (40 *N. Y.*, 124) the phrase in the statute, "statement of facts," must be construed to mean, and be confined to, a statement of such facts as are constitutive parts of the cause of action.

No order of arrest having been obtained, the execution cannot be sustained on the ground of the existence of such an order.

In the view hereafter expressed an order of arrest could not have been granted in this case, except on affidavit showing that defendant was either a non-resident of the state, or about to remove therefrom. But this question is not now before me, for no facts appear which call for a decision upon that point.

It therefore remains to be seen, only, whether the facts alleged in the complaint which constitute the cause of action, show one of the causes of arrest specified by section 179. It is contended that they do, it being claimed that the complaint sets forth facts constituting a cause of action for an injury to the person.

It is true that the complaint sets forth a cause of action for negligence. It is therefore founded on tort. But the tort alleged is not such as will authorize an arrest of the defendant.

Even if the term "injury to person," as used in section 179, can be deemed to include all kinds of personal injuries, be they occasioned by acts of omission or of commission on

the part of the defendant, it cannot be extended by judicial construction beyond injuries to the person of the plaintiff. An action for such an injury dies with the plaintiff.

The case at bar is not an action for an injury to the person of the plaintiff, but a statutory action founded upon the death of plaintiff's intestate. It could not have been maintained at common law. It is purely the creature of a statute. The statutes under which such actions are now maintainable are: Laws 1870, chapter 78, page 215, amending Laws 1847, chapter 450, page 575, and Laws 1849, chapter 256, page 338. They provide for the recovery of pecuniary damages not exceeding $5,000, but give no remedy against the person of the defendant.

They are in derogation of the common law, and hence their provisions cannot be extended and deemed to confer, by implication, a right of arrest, as long as their language is not fairly susceptible of such an interpretation.

The execution against defendant's person must be set aside, with ten dollars costs.

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CONTAINING THE WHOLE OF

52 How., ante, and Questions of Practice Contained in 8 and 9 Hun, and 63 N. Y. Reports.

ABATEMENT AND REVIVAL.

1. An action to compel a specific performance of a contract entered into by the deceased, brought against his executors, does not *abate*, nor is it put in abeyance by the death of one of the three executors. The right of action and the ground of relief continues against the surviving executors; the decree could be against them the same as if their co-executors had lived. A suggestion of the death of the co-executor in the record is all that is necessary. (*Patterson* agt. *Copeland*, *ante*, 460.)

2. The defendant herein set up in his answer the pendency of another action, brought against him by the plaintiff for the same cause of action, and stated that he would set up the pendency of the former action "as a bar to the further prosecution of this action." Upon the trial the plaintiff insisted that the answer was insufficient, for the reason that the plea should have concluded with a prayer that the writ be quashed or the suit abated, and that it could not be set up as a bar to the action:

Held, that the objection was properly overruled; that, under the present system of pleading, the answer was not required to contain any prayer for the particular relief demanded by the defendant, or any statement as to what he might consider to be the legal effect of the facts set up.

Held, further, that if any objection existed to the answer it should have been presented by a demurrer, and that it was waived by going to a trial upon the issue of fact. (*Dawley* agt. *Brown*, 9 *Hun*, 461.)

3. In an action against a railroad company to recover damages for injuries sustained by a passenger in consequence of being unlawfully ejected from its cars, defendant's counsel, as a condition for putting the cause over a circuit, stipulated that in case of the death of plaintiff before final judgment and determination of the action the alleged cause of action should survive, and any verdict and judgment be regarded as if rendered in plaintiff's lifetime; and also, that in case of such death plaintiff's representatives might be substituted as plaintiff. *Held*, that the stipulation continued in force until final judgment, although meanwhile a verdict and judgment in plaintiff's favor had been set aside. (*Cox* agt. *N. Y. C. and H. R. R. R. Co.*, 63 *N. Y. R.*, 414.)

4. Also, *held*, that the stipulation was one the attorney for defendant or its counsel (it having been conceded that the counsel had the same authority as the attorney) had power to make; that the court had the authority to impose the condition; that it was not against public policy, and was binding upon defendant. (*Id.*)

5. A verdict and judgment obtained in plaintiff's lifetime having been set aside, plaintiff died before a second trial, and his executors were substituted. Upon the second trial the objection that the

action did not survive was taken and overruled. *Held*, no error; that plaintiff's representatives might have proceeded with the action in the name of the original plaintiff, but their becoming parties to the record was no insuperable objection to a judgment in their favor; and that the stipulation was a sufficient answer to the objection. (*Id.*)

6. A proceeding to foreclose a mechanic's lien under the mechanic's lien law, for the city of New York, of 1863 (*chap.* 500, *Laws of* 1863), is not an action within section 121 of the Code. (*Leavy* agt. *Gardner*, 63 *N. Y. R.*, 624.)

7. The proceeding abates upon the death of the defendant, and cannot be revived against his devisees or representatives. (*Id.*)

ACCOUNTING.

1. A judgment in an action for an accounting between partners, requiring the payment of a specified sum of money by one of the parties to a receiver, may be docketed in favor of the receiver and be enforced by execution. (*Geery* agt. *Geery*, 63 *N. Y. R.*, 252.)

2. An action, based upon the judgment, brought to set aside conveyances of real estate made by the party so charged as in fraud of creditors, and to reach his real estate and equitable assets, cannot be maintained without first docketing such judgment and issuing execution thereon. (*Id.*)

ACCOUNT STATED.

1. A settlement of an account between parties, involving the receipt and disbursements of moneys, will not preclude a party to the settlement from afterwards preferring a claim for overcharges and misrepresentations, with respect to the subject-matter settled, if afterwards discovered. (*Anthony* agt. *Day*, *ante*, 35.)

2. Before a party can demand a rescission of a contract he must restore, promptly and completely, or offer to do so, what he has received under it, unless such restoration has been rendered impossible by the act of the party charged with the fraud. (*Id.*)

3. The persons necessary to be made parties to such an action, considered. (*Id.*)

4. An account stated or settled is a mere admission that the account is correct; it is not an estoppel. The account is still open to impeachment for mistakes or errors. Its effect is to establish *prima facie* the accuracy of the items without proof, *and the party seeking to impeach it is bound to show affirmatively the mistake or error alleged.* (*Barker* agt. *Hoff*, *ante*, 382.)

5. Where a plaintiff desires or intends to impeach an *account stated* for error or mistake, he must allege the existence of such error or mistake in his pleadings. (*Id.*)

6. The rule is that where, upon a general bill for an account, the defendant sets up a stated account in bar, the complainant will not be permitted to show mistakes or errors in such account, but must amend his bill, as the settled account is *prima facie* a bar to the suit until specific errors are assigned. (*Id.*)

7. Where the reply of the plaintiff alleged no error in the account, except that it was not a full account and was made for the specific purpose of inducing Townsend to act as trustee:

Held, that the reply does not contain such allegations as bring

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the plaintiff within the rule; and he having failed to establish that the account was made for the purpose alleged in the reply, is not in a position to attack the account as erroneous. (*Id.*)

8. In this action, brought to recover the price of goods sold in the month of December, 1872, and February, 1873, it appeared that an account for the same was rendered in the summer of 1873, to the defendant, and by him retained without objection until the commencement of this action, in August, 1874. The defendant set up as a defense to the action that the goods were sold to his son, and that the latter was not defendant's agent, or authorized to buy goods on his credit. *Held*, that, by receiving the account, and retaining it without objection for so long a time, the defendant must be deemed to have acquiesced in its correctness, and could not now insist upon the defense attempted to be set up. (*Avery* agt. *Leach*, 3 *Hun*, 106.)

9. *It seems*, that to give to an account delivered the force of an account stated, because of silence on the part of the party receiving it, the circumstances must be such as to justify an inference of assent, upon his part, to its correctness. Where he has disclaimed all liability upon the account, he is not bound to examine the items, upon its delivery to him, and his omission to object will not be taken as an admission of their correctness and is not *prima facie* proof of the account. (*Quincey* agt. *White*, 63 *N. Y. R.*, 370.)

10. The mere rendering of an account does not make it an account stated, and an omission to object to it raises only a presumption of assent, which may be rebutted by circumstances tending to a contrary inference. (*Guernsey* agt. *Rexford*, 63 *N. Y. R.*, 631.)

ACCORD AND SATISFACTION.

1. Plaintiff being the owner of two promissory notes for $2,000, made by the defendant, commenced an action thereon, and also commenced an action against the wife of the defendant. Subsequently the plaintiff received from the defendant $1,500 on the notes and twenty-five dollars for costs, and gave to defendant and wife a receipt "in full of notes, agreements or claims of all kinds against these parties, it being understood that this transaction finishes all suits or litigation against said parties, and all suits are hereby discontinued," defendant agreeing to make no claim for certain machinery, then held by the plaintiff as collateral to an indebtedness from one Weed. *Held*, that this was an accord and satisfaction, and that the plaintiff could not maintain an action to recover the balance due upon the notes. (*Pardee* agt. *Wood*, 8 *Hun*, 584.)

ACTION.

1. Where a complaint alleged that defendants received from the plaintiff his promissory note for $534, indorsed by one Sanborn, upon the agreement that they would return the same before maturity; the maturity of the note; a failure to return the same and a sale thereof by defendants before maturity, *held*, that it stated facts sufficient to constitute a cause of action. (*Loomis* agt. *Mowry*, 8 *Hun*, 311.)

To set aside assessment as illegal — not maintainable, unless defects in assessment be such as would not appear in proceedings to enforce the lien of the assessment. (*See Boyle* agt. *City of Brooklyn*, 8 *Hun*, 32.)

2. Where plaintiff and defendant entered into an agreement whereby the former was to furnish rooms

and board for the defendant and his family for one year, and defendant, before the year expired, left the house, without sufficient reason therefor, *held*, that the plaintiff was entitled to bring an action for the breach of the contract, without waiting for the expiration of the year. (*Wetmore* agt. *Jaffray*, 9 *Hun*, 140.)

8. After a recovery in ejectment an action was brought to recover the damages arising from the unlawful detention of the property. *Held*, that the right to the rents and profits was limited by statute to those accruing within six years, and that it was not necessary that the statute should be pleaded as a defense to entitle the defendant to its protection. (*Grout* agt. *Cooper*, 9 *Hun*, 326.)

An action can be maintained for the wrongful conversion of personal property — although before the action is brought the defendant has, in fact, disposed of and fully parted therewith. (*See Barnett* agt. *Selling*, 9 *Hun*, 236.)

May be maintained by a husband, under chapter 646 of 1873, for injuries to his wife occasioned by the reckless driving of one intoxicated. (*See Aldrich* agt. *Sager*, 9 *Hun*, 537.)

By judgment creditor of bankrupt to set aside fraudulent conveyance — may be maintained, providing the assignee be made a party to such action. (*See Dewey* agt. *Moyer*, 9 *Hun*, 473.)

On judgment — of United States circuit court — appeal, without security, from such judgment — does not prevent an action on the judgment being brought in another court. (*See Matson* agt. *Burt*, 9 *Hun*, 470.)

4. Under the provisions of the Revised Statutes (2 *R. S.*, 199, *sec.* 153) prohibiting an action at law, unless authorized by the court, to recover a debt secured by a mortgage during the pendency of an action to foreclose the mortgage, or "after a decree rendered thereon," the court is not absolutely bound to grant an application for leave to commence an action to recover a deficiency arising upon a sale under a judgment in a foreclosure suit wherein no provision was made for a deficiency, but may, in the exercise of a sound discretion, grant or refuse it, in accordance with the equities of the case. (*E. L. Ins. Co.* agt. *Stevens*, 63 *N. Y. R.*, 341.)

5. *It seems*, that where the mortgagee has voluntarily refrained from asking a decree for any deficiency, some satisfactory reason should be assigned for permitting him to institute a separate action at law for its recovery. (*Id.*)

6. A proceeding to foreclose a mechanic's lien under the mechanic's lien law, for the city of New York, of 1863 (*chap.* 500, *Laws of* 1863), is not an action within section 121 of the Code. (*Leavy* agt. *Gardner*, 63 *N. Y. R.*, 624.)

7. The proceeding abates upon the death of the defendant, and cannot be revived against his devisees or representatives. (*Id.*)

ADMINISTRATOR.

1. When one possessed of personal property dies intestate, leaving no wife or descendant, parent, sister or brother, but leaves an aunt, and the children of deceased uncles and aunts, the aunt takes the entire estate under the statute of distributions as the nearest of kin, and is entitled to letters of administration; and in such a case no citation need issue to the cousins, as they have no interest in the estate of the decedent (*Matter of Gooseberry*, *ante*, 310.)

2. If several persons claim letters of administration and the verified petitions of each set forth that the deceased died intestate, and left personal property within the state, oral proof, upon the hearing, is unnecessary to show the intestacy of the deceased, or that at the time of death he had personal property within the jurisdiction of the court. (*Id.*)

3. The question of the costs of the administrator establishing relationship to decedent, should be reserved until the final accounting. (*Id.*)

ADVERSE POSSESSION.

1. In order to enable a party to maintain an action for the partition of lands, he must not only have an estate in the premises, as a joint tenant, or tenant in common, but he must be in the actual or constructive possession of his individual share or interest. (*Therasson* agt. *White, ante*, 62.)

2. Where the premises are held adversely, the party out of possession cannot try the question of title in this form of action. It is a question for the determination of a jury. (*Id.*)

3. In an action brought to recover damages for a trespass committed upon the land of the plaintiff, the defendant claimed to hold the lot by adverse possession. It appeared upon the trial that the lot was inclosed on one side by a highway, on two sides by fences, and on the remaining side by a distinct line of marked trees from corner stake to corner stake. *Held*, that the lot was not protected by a substantial inclosure within the meaning of subdivision 1 of section 85 of the Code. (*Pope* agt. *Hanmer*, 8 *Hun*, 265.)

4. It further appeared upon the trial that the defendant had occasionally used the lot (a wood-lot) as a pasture, and that he had, now and then, taken wood and timber from it for shingles and staves. *Held*, that this did not show it to have been usually cultivated or improved, within the meaning of subdivision 2 of section 85 of the Code. (*Id.*)

5. To constitute such an adverse possession of land as will render a conveyance thereof void, it must be held under a claim of some specific title; a general assertion of ownership, irrespective of any particular title, will not avail. (*Higginbotham* agt. *Stoddard*, 9 *Hun*, 1.)

AFFIDAVIT.

1. The examination of parties who are made defendants in expectation or hope that upon their examination some cause of action may thereby be discovered against them or against any co-defendant, will not be allowed where no cause of action is shown by *affidavits* to exist against them in favor of plaintiffs. (*Tilton* agt. *United States Life Ins. Co.*, *ante*, 179.)

2. Affidavits on mere information and belief, not stating any of the evidence upon which such belief is founded, are wholly insufficient for such purpose. (*Id.*)

3. The distinction between an affidavit and complaint pointed out. (*Id*)

Corporation cannot make affidavit required under act of March 2, 1867, to remove cause to United States court. (*See Mix* agt. *Andes Ins. Co.*, 9 *Hun*, 397.)

AGENCY.

1. An agreement was executed by certain shareholders of a manu-

facturing company, reciting, in substance, that in order to raise money to carry on its business, notes should be made from time to time, and indorsed by one or more of them, and that in case any of the indorsers of such paper should incur any loss by reason thereof, each should pay his equal proportion thereof. In an action by one of them, who had indorsed and paid such paper, to recover from the executors of H., another signer of said agreement, his proportion thereof, the complaint not alleging that said note was indorsed in the lifetime of H:

Held, on demurrer thereto that it did not state facts sufficient to constitute a cause of action; that the agreement, in substance, created an agency by which any shareholder could bind another, if not to the holder of the paper, at least to the other joint signers of the agreement, as a surety for the corporation; that as an agency is revoked by the death of the principal, the power to bind H. ceased at his death, and as no obligation by indorsement was alleged to have been incurred by the plaintiff during the lifetime of H., and on his death any authority to bind him or his estate ceased, no cause of action was stated.

Held, further, that the contract imposed a joint, and not a several or joint and several liability, upon the signers of it; that there was no consideration for the agreement except the suretyship; that formerly the liability of any one of the joint contractors was discharged at law by death, and no action could be maintained against his personal representatives in equity where the joint obligation was founded solely upon the consideration of suretyship, but under the modern doctrine, the representatives of H. would probably have been liable to contribute for any liability incurred by the plaintiff, for an indorsement made during the lifetime of H. (*Helmer* agt. *St. John*, 8 *Hun*, 166.)

AMENDMENT.

1. After the service of a demurrer any time before the expiration of twenty days, it may be substituted by an answer as an amendment. (*Robertson* agt. *Bennett*, *ante*, 287.)

To pleading — right of referee to allow it, so as to convert an action for use and occupation by one cotenant into an action for an account, under 1 Revised Statutes, 750, section 9. (*See Joslyn* agt. *Joslyn*, 9 *Hun*, 388.)

ANSWER.

1. It is a good answer to an action for seizing property under an attachment, that the suit in which the attachment was issued is still pending; and this, though the plaintiff's complaint in the attachment suit was dismissed, if an appeal from the judgment of dismissal has been duly taken, and the appeal be pending undetermined. (*Peck* agt. *Hotchkiss*, *ante*, 226.)

Where the assignee in bankruptcy is not made a party to an action, or proceeding affecting property fraudulently conveyed by the bankrupt prior to the bankruptcy, the defendants must set up the defect of parties in their answer, otherwise the right to object on that ground is waived. (*See Dewey* agt. *Moyer*, 9 *Hun*, 421.)

Where an answer sets up a plea in abatement, it is not required also to contain any particular prayer for the relief demanded, or any statement of what the defendant may consider to be the legal effect of the facts set up by him. (*See Dawley* agt. *Brown*, 9 *Hun*, 461.)

See CONTRACT.
McKee agt. *Cheney*, *ante*, 144.

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APPEAL.

1. A motion for a new trial under section 268 of the Code is only allowable where the decision filed under section 267 *does not authorize a final judgment.* (*Produce Bank* agt. *Morton, ante*, 157.)

2. Where the amount of plaintiff's claim was ascertained, judgment was rendered that the assignment be set aside, that the assignee deliver over the assigned property to a receiver, and that the plaintiff be paid out of the proceeds the amount of his claim and costs:
   Held, that the judgment was final and reviewable by appeal; that the machinery of a reference and receivership was for the sole purpose of carrying the judgment into execution, and not the foundation of any further judicial action in the case. (*Id.*)

3. An appeal from an order granting a new trial cannot be had to the court of appeals where the amount of the judgment or subject-matter in controversy does not exceed $500 (*Laws of* 1874, *p.* 378). (*Id.*)

4. *It seems* that the amount of the judgment when entered must govern the question of appealability, and that interest accruing after its rendition cannot be added for the purpose of bringing it up to the requisite amount. Where judgment has been rendered for a specific amount, that must be the test. Where there is no judgment, or it is not for a specific sum, the value of the subject-matter in controversy must be ascertained. (*Id.*)

5. On appeal from a justice's court, before the act of 1863 (*chapter* 392), security was only required when a stay of execution was desired; since that act, where, by the terms of section 352, the appellant is entitled to a new trial, security is required to perfect such appeal, and give jurisdiction thereon to the county court. (*Kuntz* agt. *Licht*, 8 *Hun*, 14.)

6. A refusal to dismiss such appeal when security has not been filed affects a substantial right, and the order refusing it is appealable. (*Id.*)

7. A party by appealing from an order denying a motion with leave to renew the same, is precluded from taking advantage of the leave to renew granted thereby; and such appeal will be dismissed if, while the same is pending, the motion be renewed in the court below. (*Harrison* agt. *Neher*, 9 *Hun*, 127.)

8. Where a party objecting to the confirmation of a referee's report limits his exceptions to the findings of fact and conclusions of law of the referee, no question is raised by them as to the admission of improper or illegal evidence, or as to any thing that occurred during the progress of the trial. If the party aggrieved desires to review these questions, he should specify, as part of his exceptions to the report, that it was founded on illegal evidence, and that the referee had improperly overruled his objection to the reception thereof. (*Brown* agt. *The Mayor*, 9 *Hun*, 587.)

9. By the mere service of a complaint, on which judgment could not regularly be taken without an application to the court, no substantial right of the defendant is injured or affected, even if the summons stated that judgment, in case of default, would be taken for the debt, as a matter of course. For that reason no appeal can properly be taken from an order denying a motion to strike the allegation of fraud out of the complaint, or denying a motion to vacate an order of arrest based thereon. (*Barnett* agt. *Benjamin*, 9 *Hun*, 705.)

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From judgment of United States circuit court, without security, — does not prevent an action on his judgment being brought in another court. (*See Matson* agt. *Burt*, 9 *Hun*, 470.)

10. Under the act of 1874 amending section 11 of the Code (*chap.* 322, *Laws of* 1874), the amount of a judgment, without reference to the interest after recovery, is made the test of its appealability to this court. (*Ryan* agt. *Waule*, 63 *N. Y. R.*, 57.)

11. The fact that the judgment was rendered before the passage of said act does not take the case out of its operation. The right of appeal is one of the remedies at all times within the control and discretion of the legislature. (*Id.*)

12. Accordingly, *held*, where in an action for slander a judgment upon a verdict for $500 was perfected before the passage of said act, that an appeal to this court after its passage could not be taken without an order of the general term. (*Id.*)

13. Plaintiff brought suit to determine the validity of a lease of its road. Defendant S. had judgment upon demurrer to the complaint, and was granted an extra allowance of $4,000. *Held*, that the subject-matter of the action was the lease, and that its value, not the value of the road or the rental value thereof, should have been taken as the basis of the extra allowance; and there being no proof that the lease was of any value, that the allowance made was unauthorized. (*O. and L. C. R. R. Co.* agt. *V. and C. R. R. Co.*, 63 *N. Y. R.*, 176.)

14. An agreement to waive the right to appeal, to be valid, must be based upon some consideration or the facts must estop the party from exercising the right. (*Id.*)

15. Plaintiff's complaint stated that if the lease should be declared valid by a competent legal tribunal, plaintiff "would be content therewith." Upon motion to dismiss appeal, *held*, that this statement did not deprive plaintiff of a right to appeal from the judgment. (*Id.*)

16. Plaintiff, after judgment and appeal, continued to receive the rents reserved by the lease. *Held*, that it was not thereby estopped from prosecuting its appeal, as whether the lease should ultimately be held valid or not plaintiff was entitled to compensation in some form for the use of its road, and by taking what the parties had stipulated to be the value of such use, plaintiff did not deprive itself of its right to appeal. (*Id.*)

17. The defendants, other than S., demurred to the complaint on the ground that the court had no jurisdiction, and the demurrer was sustained. *Held*, that it was not proper to dismiss the appeal upon that ground, or to decide the issues in the case upon the motion. (*Id.*)

18. It was also claimed that the appeal should be dismissed as to non-resident defendants, because the process was not properly served upon them. *Held*, that said defendants having appeared and demurred, thereby waived all objections to the regularity or sufficiency of service. (*Id.*)

19. In an action brought by the attorney-general in the name of The People under the act of 1875 (*chap.* 49, *Laws of* 1875), to recover moneys alleged to have been fraudulently obtained from a municipal corporation, the ordering of a bill of particulars is in the discretion of the court below, and its decision is not reviewable here. (*People* agt. *Tweed*, 63 *N. Y. R.*, 194.)

20. So also a decision of the general term refusing upon decision

of the appeal from the order of special term to extend the time to demur to the complaint is a matter of discretion and not appealable. (*Id.*)

21. It is within the discretion of the court below whether to compel an election between two causes of action stated in the same count of a complaint, also whether to require them to be separately stated and numbered, and its refusal so to do is not reviewable here. (*Id.*)

22. A defendant may be held to bail in a second action commenced for the same cause as that of a previous action discontinued, where the second action is not vexatious. (*People* agt. *Tweed*, 63 *N. Y. R.*, 202.)

23. Whether it is so or not is a question of fact depending upon the circumstances, and the decision thereof is not reviewable here. (*Id.*)

24 The question as to the amount of bail is one of discretion for the court below, and its decision is not appealable. (*Id.*)

25. An appeal to this court is perfected when a notice of appeal and proper undertaking is served, and it is the duty of the appellant to serve printed copies of the case within forty days thereafter (*rule* 7), and this although the sureties in the undertaking are excepted to, and proceedings for the justification subsequently taken. (*Wade* agt. *De Leyer*, 63 *N. Y. R.*, 318.

26. An order denying a motion to open a default, and to set aside a judgment regularly entered thereon, because of *laches* on the part of the moving party, is not reviewable here. (*Id.*)

27. In an order of special term granting an application for leave to sue for a deficiency, arising on foreclosure sale under a judgment of foreclosure, it was stated that it was granted "solely on the ground that the court had no power or authority to deny the same." By the order of the general term this was "in all things affirmed." *Held*, that this was presumptively an affirmance, in all respects, of the decision of the special term, and in the absence of any thing in the case showing that the general term exercised its discretion and affirmed the order upon the merits, the question as to the power of the court was presented, and was reviewable here. (*E. L. Ins. Co.* agt. *Stevens*, 63 *N. Y. R.*, 341.)

28. The discretion of the court below in granting or refusing a writ of injunction is not an arbitrary one; and, if improperly exercised, may be corrected on appeal. (*Campbell* agt. *Seaman*, 63 *N. Y. R.*, 568.)

29. Where the provisions of a judgment entered upon the report of a referee as to an injunction are broader and more unlimited than authorized by the report, the error cannot be corrected upon appeal from the judgment; the remedy of the party aggrieved is to move to set aside or correct the judgment. (*Id.*)

30. *It seems*, that the record of the decision of an appellate court is the highest evidence of what the court decided, and where a point appears thereby to have been adjudicated, it is controlling, even if the opinion delivered contains adverse expressions. (*Un. Nat. Bank* agt. *Kupper*, 63 *N. Y. R.*, 617.)

31. If there was a mistake in the judgment rendered, the remedy is by motion to correct it. (*Id.*)

32. A denial of a motion for a new trial, made upon the judge's minutes, is not the subject of an exception, and such an exception presents no question of fact for

review upon appeal from the judgment. (*Matthews* agt. *Meyberg*, 63 *N. Y. R.*, 656.)

33. To bring up the case for review upon the facts there must be an appeal from the order denying the motion for a new trial. (*Id.*)

34. Court will not look into evidence to reverse judgment in the absence of findings or requests to find. (*Id.*)

ARBITRATION.

See AWARD.
Halstead agt. *Seaman*, *ante*, 415.

1. Where the parties to an action upon a promissory note submit the controversy to arbitrators who award to the plaintiff thirty-five dollars, together with the costs to which he has been subjected in the action, such award is sufficiently definite and certain. (*Boughton* agt. *Seaman*, 9 *Hun*, 392.)

2. One Abby Welwood, being the owner of certain lots, a contract was entered into by her husband with one Schleier, by which he, Schleier, was to sell the same, and receive a portion of the profits for his services in so doing. Disputes having arisen as to the amount due thereunder, a contract was entered into by all the parties in interest, on January 10, 1872, to settle the same. Subsequently this was rescinded by mutual consent, and thereafter, to settle numerous actions instituted against each other by these parties, and by the assignee in bankruptcy of Schleier, it was submitted to arbitrators, "to settle without further litigation the many actions and causes of action existing between the parties, * * * and all other actions or causes of actions now existing and unsettled." (*Jones* agt. *Welwood*, 9 *Hun*, 166.)

3. The award of the arbitrators held that all matters of difference between the parties were settled by the contract of January 10, 1872, and then proceeded: "This award is not intended to determine any of the rights of either of the said parties arising under" said contract. *Held*, that the award should be set aside, on the ground that it did not specifically and finally terminate the rights of the parties thereto. (*Id.*)

ARREST.

1. An action for malicious prosecution may be maintained for instituting civil suits, where the suits are commenced maliciously and without probable cause and terminated in favor of the plaintiff. (*Dempsey* agt. *Lepp*, *ante*, 11.)

2. In such a case an order of arrest, under section 179 of the Code, is authorized. (*Id.*)

3. The proper remedy for the discharge of a person held in custody, after a surrender or delivery of his bail, and after the statutory time has elapsed in which he must be charged on execution, is by *supersedeas* (2 *R. S.* [*Edm. ed.*], *p.* 577, *sec.* 37). (*Standacher* agt. *Pregenzer*, *ante*, 76.)

4. The time within which a defendant must be charged on execution, before a *supersedeas* can be moved for, is to be computed from the time the judgment is actually entered, not from the time the plaintiff is entitled to judgment. (*Id.*)

5. Any evidence of the entry of judgment three months prior to the application for the *supersedeas*, or of a failure to charge the defendant in execution three months after the surrender, is sufficient, and where such proof is furnished and not denied, the defendant must be discharged. (*Id.*)

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6. Where a *specific sum of money* is intrusted to a party upon the credit of his personal integrity to be invested in a *particular way*, it cannot be charged to his mercantile credit, which is based upon his financial status only, and be thereby reduced or changed to a simple debt. (*Obregón* agt. *De Mier*, *ante*, 356.)

7. Such money is held by him in a *fiduciary capacity* and must be used as directed by the owner of the fund; and the relation is not changed, though the previous directions are rescinded and a new direction is conveyed in the form of a draft upon him for the whole sum. (*Id.*)

8. Although, by the acceptance of the draft the defendant incurred a liability to the payees and holders of the draft, it is sufficient upon the trial to surrender any such securities. (*Id.*)

See PRACTICE.
Forward agt. *French*, *ante*, 88.

9. The term, "injury to person," as used in section 179 of the Code, cannot be extended by judicial construction beyond injuries to the person of the *plaintiff*. An action for such injury dies with the plaintiff. (*Ryall* agt. *Kennedy*, *ante*, 517.)

10. An action brought by an administrator against the master of a vessel for negligently causing the death of his intestate, is not such an action as will authorize the arrest of the defendant. (*Id.*)

11. It is not an action for an injury to the person of the *plaintiff*, but a statutory action founded upon the death of plaintiff's intestate. The statutes under which such actions are now maintainable provide for the recovery of pecuniary damages not exceeding $5,000, but give no remedy against the person of the defendant. They are in derogation of the common law, and hence their provisions cannot be extended and deemed to confer, by implication, a right of arrest, as long as their language is not fairly susceptible of such an interpretation. (*Id.*)

12. Two defendants having been arrested, in action brought against them by the plaintiff, the defendants in this action executed an undertaking to procure their discharge. Subsequently, upon an execution issued against their persons upon a judgment recovered in the first action, the sheriff arrested one and returned as to the other *non est inventus*. In an action upon the undertaking, *held*, that the arrest and imprisonment of one defendant did not relieve the sureties to the undertaking from their liability for the escape of the other. (*Crouse* agt. *Paddock*, 8 *Hun*, 630.)

13. Upon an indictment for forgery the prisoner, on his examination in his own behalf, was asked, with a view of impeaching his character, "How many times have you been arrested?" *Held*, that the question was improper, as the mere fact of his arrest had no tendency to impeach his character in any particular. (*Brown* agt. *People*, 8 *Hun*, 562.)

14. This action was brought upon a promissory note given in 1869, but upon which payments had been made within six years. After the time to answer had expired, plaintiff procured an order of arrest, on an affidavit that the note was given for the balance of a credit for goods sold to the defendant in 1868, upon fraudulent representations then made by him. *Held*, (1) that as this action was upon the note, an order of arrest could not be procured on the ground that the debt for which it was given was fraudulently incurred; (2) that the claim arising from the fraud was barred by the statute of limitations, and that the

payment kept alive the note alone, and not the fraud. (*Fritts* agt. *Slade*, 9 *Hun*, 145.)

15. In an action to recover the possession of personal property, subdivision 3 of section 179 of the Code authorizes an order of arrest: (1) where the property has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff, with the intent that it should not be so found and taken, and (2) where it has been concealed, removed or disposed of, with the intent to deprive the plaintiff of the benefit thereof. (*Barnett* agt. *Selling*, 9 *Hun*, 236.)

16. An action to recover the possession of personal property may be maintained, and an order of arrest obtained, although before the action is brought the defendant has, in fact, disposed of and fully parted therewith. (*Id.*)

17. Where a person, to induce another to contract with him, makes statements known by the former to be false, or where he intends to convey the impression that he has actual knowledge of their truth, when conscious that he has no such knowledge, and they are in fact false, he thereby commits a fraud upon the other party. (*Bishop* agt. *Davis*, 9 *Hun*, 342.)

18. When such representations are affirmative in character, positive and unequivocal, without condition or qualification, and are not made upon information or belief, or as matter of opinion, they must be regarded as designed to convey the impression that he had actual knowledge of their truth. (*Id.*)

ASSAULT AND BATTERY.

1. In an action for assault and battery, the defense was: (1) general denial, (2) *son assault demesne*, (3) justification in defense of defendant's real property. The plaintiff recovered a verdict of six cents, and having obtained a certificate from the county judge that the title to real property was put in issue by the pleadings and came in question upon the trial, he taxed full costs. *Held*, that this was proper, and that a motion to strike from the judgment all costs in excess of six cents was properly denied. (*Lillis* agt. *O'Conner*, 8 *Hun*, 280.)

2. Such certificate is conclusive upon the taxing officer, to show that the title to land came in question upon the trial. (*Id.*)

ASSESSMENTS.

1. By the act of April 12, 1865 (*Laws of* 1865), the construction of any sewer or drain in the city of New York is absolutely prohibited, unless such sewer or drain shall be in accordance with a general plan devised by the Croton board for the sewerage of the particular district in which such sewer or drain is proposed to be constructed. (*In re Blodgett*, *ante*, 120.)

2. An assessment for a sewer contracted for before such a general plan has been devised, is void. (*Id.*)

It seems, that the provisions of section 4 of the act as to the filing of the copies of maps and plans in the different offices designated by that section, has been held to be directory only (*See Matter of The N. Y. Prot. E. Public School*, 47 *N. Y. R.*, 556). (*Id.*)

ASSESSORS OF NEW YORK.

1. The board of assessors of the city of New York is authorized and directed to estimate the damage sustained by owners of property by reason of the closing of streets and roads by the Central Park

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Commissioners. (*People ex rel. Carleton* agt. *Assessors of New York*, *ante*, 140.)

ASSIGNEES.

1. Where an attorney becomes assignee of an insolvent firm, and prior to the assignment receives from such firm certain notes, to provide a fund to meet the counsel fees and disbursements of future litigations arising under it affecting them, and a fee of $5,000 was then stipulated and agreed upon between the parties for that purpose:

   Held, that the assignee having collected over $5,000 from these notes, should be chargeable with the surplus. (*Winn* agt. *Crosby*, *ante*, 174.)

2. An assignee who is an attorney is precluded from applying the trust funds to the payment of himself, or of firms in which he may be a partner, for professional services rendered in the administration of the trust. (*Id.*)

3. Where the defendant, as assignee, received as part of the property of the insolvent firm, four notes of Asa D. Dickinson, amounting to $42,720, given for the purchase-price of the stock of goods belonging to the insolvent firm, said notes being received by the defendant when the assignment was executed and the day after they were made, and after retaining these notes for a number of years, in order to prevent the statute of limitations from affecting the same, took from Dickinson notes of equal amounts, with interest, to himself individually, and some collateral security therefor, surrendering the old notes; these notes the defendant claims to now hold, and in his answer he sets up that Dickinson the maker is responsible; the defendant has never taken any legal proceedings to enforce their payment; the only reason given by the defendant why they had not been collected was that Dickinson claimed that he had paid too high a price for the goods and that he had a partial defense to the notes; the value of the goods are found by the referee to be as much as the amount of the notes:

   Held, that in view of this delay, for these many years, of the defendant, in omitting to take legal steps to enforce the collection of the notes, his transferring them to Dickinson for other notes, payable to himself, individually, and the probable detriment to the assigned estate which the delay has occasioned, shows such neglect as is sufficient to charge him with them. There is no other way by which the trust estate can be protected from prejudice by the failure of duty on the part of the defendant as assignee, than by charging him with the notes. (*Id.*)

ASSIGNMENT.

1. It is not sufficient ground for setting aside an assignment, that the affidavit to the schedules or inventory was made before a person not legally qualified to administer the oath. (*Produce Bank* agt. *Morton*, *ante*, 157.)

2. *It seems* that it was the intent of the legislature of 1874 (*Laws of* 1874, *chap*, 600, *p.* 824) to abrogate the rule laid down in *Juliand* agt. *Rathbone* (39 *N. Y.*, 369), and that the provision allowing the assignee within six months to file schedules was not intended as a condition, the breach of which should invalidate the assignment. (*Id.*)

3. The Code confers ample power, even upon a county judge, to compel a judgment debtor to apply his property to the payment of a judgment against him, and, if necessary, to execute a conveyance thereof, whether it be within

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or without the state, in accordance with the practice existing at the time of the passage of the Code. The same reasoning applies alike to real and personal property, and hence includes letters patent. (*Clan Renald* agt. *Wyckoff*, *ante*, 509.)

4. The superior court of the city of New York possesses not only all the authority specifically conferred by the sections of the Code relating to proceedings supplementary to execution, but also the same inherent equity powers and jurisdiction which are possessed by the supreme court for that purpose; therefore, the power to compel a judgment debtor to execute and deliver to a receiver an assignment of his interest in letters patent *seems* to be ample. (*Id.*)

5. When an executory contract is not necessarily personal in its character and can, consistent with the rights and interests of the adverse party, be fairly and sufficiently executed as well by an assignee as by the original contractor, and where the latter has not disqualified himself from a performance of the contract, it is resignable. (*Devlin* agt. *The Mayor*, 63 *N. Y. R.*, 8.)

6. The assignment by the contractor of a contract with a municipal corporation for work, is not against public policy so long as the corporation retains the personal obligation of the original contractor and his sureties; and in the absence of any thing in the statute, which authorized the work, prohibiting it, such an assignment is valid. It does not terminate the contract or authorize the corporation to repudiate it. (*Id.*)

7. A title by foreclosure sale is not defective because of a failure to record an assignment of the mortgage. There is no legal need of a record or of a written assignment; a good assignment may be made by delivery only. (*Fryer* agt. *Rockefeller*, 63 *N. Y. R.*, 268.)

ATTACHMENT.

1. By the Code an attachment can only be issued in an action arising on contract for the recovery of money only, or in an action for the wrongful conversion of personal property. (*Wilson* agt. *Harvey*, *ante*, 126.)

2. This action is brought against the infant defendants and their general guardian. The infants and their general guardian are non-residents and the plaintiff is a sister of the infants' mother. Three causes of action are stated in the complaint: 1st. For boarding and maintaining the infants. 2d. For maintaining and taking care of their mother after the death of their father. And 3d. For legal expenses incurred in protecting the interests of the infants in certain real and personal estate to which they were entitled as heirs and next of kin of a deceased relative:

Held, that this action cannot be regarded as an action arising on contract for the recovery of money only, and an attachment cannot be allowed. Even if the infant defendants could be held liable on an implied contract for the matters set forth in the first and third causes of action stated in the complaint, on the ground that the board, raiment and supplies, &c., furnished and the moneys advanced and expended by the plaintiff were necessaries, the second cause of action cannot be sustained as arising on any contract, express or implied, of the infants. If the children could have been made liable to support their mother as an indigent and infirm person, upon the facts stated in the complaint (which seems doubtful), such liability would rest wholly upon the statute (1 *R. S.*, 604 *sec.* 1) and could only be enforced in

the mode there directed. The law does not imply a promise from the child to pay for necessaries furnished, without his request, to an indigent parent, therefore the second cause of action stated in the complaint does not arise on contract for the recovery of money only.

Held, also, that the joinder of a cause of action for which an attachment cannot issue, if standing alone, pursuant to the provisions of the Code, with one for which it might be issued, precludes the issuing of an attachment or is ground for vacating the same. (*Id.*)

3. An attachment cannot be issued against a national bank or its property before final judgment in *any suit*, action or proceeding in *any state*, county or municipal court. (*Central National Bank* agt. *Richland National Bank of Mansfield*, *ante*, 136.)

4. The issuing of an attachment against these institutions or their property is strictly prohibited by congress, and it is only where jurisdiction cannot be acquired without resort to attachment that the power of congress to inhibit, or rather to postpone, the use until final judgment of such provisional remedy, seems to be at all questionable. (*Id.*)

5. This prohibition does not in any manner interfere with the general *jurisdiction* of the state courts over national banks. It does not take away the jurisdiction over such foreign corporations having property within this state. That jurisdiction is not acquired by virtue of the provisions of the Code of Procedure relating to this particular provisional remedy; the jurisdiction is acquired by the service of the summons, and that is effected under the provisions of section 134 of the Code; or where personal service cannot be had upon an officer, then it may be had by publication under the provisions of section 135. (*Id.*)

6. In an action in the marine court of the city of New York, the attorney for the plaintiffs procured an attachment to be issued against the goods of the defendant therein, and delivered the same to a marshal with directions to seize and remove such goods as should be pointed out by one Walker, a clerk of the said plaintiffs. In accordance with the directions of Walker certain goods of the plaintiffs in this action were, against their objection and protest, taken and removed from their store as the goods of the defendants in the first section, and subsequently the said attorney refused to allow the plaintiffs herein to appraise the said goods. (*Oestrich* agt. *Gilbert*, 9 *Hun*, 242.)

7. In an action against the plaintiffs in the former action to recover the value of the said goods the plaintiffs herein were nonsuited. *Held*, that this was error: (1) Because the defendants (plaintiffs in the former action) were responsible for the acts of their attorney in directing the seizure of the goods; and (2) because there was sufficient evidence of ratification on their part to require the case to be submitted to the jury. (*Id.*)

8. The principle that after the entry of a judgment in an action and the issue of an execution thereon, the attorney for the plaintiff cannot bind him by directing the sheriff to make a levy upon the property of a third person, has no application to the case of an attorney procuring an attachment to be issued in the progress of an action, and before the entry of judgment therein. (*Id.*)

9. Under section 227 of the Code, authorizing attachments to be issued in actions arising on contract for the recovery of money only, or in actions for the wrongful con-

version of personal property, an attachment cannot issue in an action in which the complaint sets forth several causes of action, some of which belong to neither of the two classes therein described. (*Mining Co.* agt. *Rahl*, 9 *Hun*, 208.)

10. Under section 243 of the Code, requiring the fees of the sheriff and the expenses incurred by him in preserving property held under an attachment to be settled by the officer issuing the same, an application for that purpose may be made before the justice issuing the attachment while holding a special term at chambers. (*German American Bank* agt. *P. and E. Coal Co.*, 9 *Hun*, 205.)

11. Section 243 of the Code, entitling the sheriff to poundage upon property seized by him under an attachment, in cases where the action is settled, to be estimated upon the amount at which such settlement is effected, is not repealed by chapter 415 of 1871, as amended by chapter 26 of 1872, prescribing the fees to be received by the sheriff for performing the services therein set forth. (*Id.*)

12. It is not necessary that the grounds upon which a warrant of attachment was issued should be set forth therein. Nothing more can be required to be stated therein than what is prescribed by the Code (*Sec.* 231). (*The Mayor* agt. *Genet*, 63 *N. Y. R.*, 646.)

13. An affidavit for an attachment stated, in substance, that upon the trial of an indictment against defendant charging him with fraudulently obtaining money from plaintiff on pretense of having furnished materials for a building which were never furnished, and on an investigation by a committee of the senate, defendant was sworn; on these occasions the warrants upon which the moneys were obtained were produced, they were indorsed by defendant, and it appeared that they had been deposited to his credit in bank; that as informed by the testimony in such proceedings, and as deponent believed, the sum received by defendant and so applied to his own use exceeding $150,000; that defendant was convicted upon such trial, but before the time fixed for sentence he escaped from the custody of the sheriff and absconded, and that although most strenuous efforts have been made to discover his whereabouts he still continues concealed; that plaintiff claimed the sum so obtained as having been obtained for its use and for recovery thereof the action was commenced. *Held*, that the affidavit was sufficient to authorize the issuing of the warrant; that it was a legitimate and rational conclusion from the facts stated that the defendant had absconded from the state with intent to place himself beyond the reach of civil as well as criminal process, and with intent to defraud his creditors. (*Id.*)

14. *It seems*, also, that the warrant could be sustained on the ground that from the facts stated it sufficiently appeared that defendant had left the state and was a non-resident. (*Id.*)

ATTORNEY.

Entitled to notice of examination of party before trial, when he has appeared for the party in the action. (*See Plummer* agt. *Belden*, 8 *Hun*, 455.)

Responsible for the insertion of irrelevant and scandalous matter in pleading — costs imposed on him therefor. (*See McVey* agt. *Cantrell and Taddiken* agt. *Cantrell*, 8 *Hun*, 522.)

1. The acts of an attorney in directing the levy upon or taking of goods upon process are in excess of his general powers as attorney, and in the absence of proof of

special authority do not subject his client to liability. (*Welsh* agt. *Cochran*, 63 *N. Y. R.*, 181.)

ATTORNEY'S LIEN.

1. An attorney has a lien on a judgment, not only for the actual costs, but for any portion of the damages which may have been stipulated, for his compensation; but he has no lien until the judgment is entered, or at least not until after verdict. (*Crotty* agt. *MacKenzie*, *ante*, 54.)

2. To protect the lien of an attorney for his costs and expenses against the settlement of a judgment, he must give notice of the lien to the judgment debtor, and where the judgment issues for both damages and costs such lien can be protected in no other way. (*Id.*)

3. Where a plaintiff recovered a judgment for a certain amount, included in which was the taxed costs, and a specified sum agreed by the plaintiff to be paid to his attorney, and afterward the plaintiff and the defendant's attorneys entered into an arrangement by which the judgment was paid and satisfied, without the knowledge of plaintiff's attorney, who, upon its discovery, issued an execution on said judgment requiring the sheriff to levy the amount of his costs and counsel fee, *held*, that such execution must be set aside; the more just and equitable rule being that the plaintiff's attorney should, before attempting to enforce his lien, be required to give notice of the lien to the judgment debtor, and that it would be better to apply to the court before he issues his execution for an order to vacate the satisfaction of the judgment. (*Id.*)

4. This would seem to be adverse to *Sweet* agt. *Bartlett* (4 *Sandf.*, 661). (*Id.*)

ATTORNEY AND CLIENT.

1. Attorneys agreed with a party who had been injured by a collision on a railroad, to prosecute an action for him, without expense to him, against the company for the damages sustained, in consideration of one-half of the damages to be recovered. On the service of the summons in the action on a director of the company, he was informed that the attorneys had an interest in the suit for their services, and the company must not settle without their consent. Afterward the company obtained, in consideration of $1,000, a release from the plaintiff (without the knowledge or consent of his attorneys) from all claim for damages:

   Held, that it would be unnecessary and unjust to set aside the release, as that would take from the defendant the protection which it afforded it against the plaintiff; but it was the duty of the referee before whom the cause was tried, having found the release to be fraudulent, to have held it void as against the attorneys, and complied with their request and ascertained the damages sustained by the plaintiff, and given judgment against the defendant for one-half the amount thereof. (*Coughlin* agt. *N. Y. Cen. and Hud. R. R. R. Co.*, 8 *Hun*, 186.)

2. The defendant having insisted that the referee could not try the question whether the release was obtained fraudulently, as that was not one of the issues referred to him:

   Held, that as the release was set up as a defense in the answer, and by the Code all allegations in the answer are to be deemed denied, unless they constitute a counterclaim, in which case a reply must be put in, the plaintiff had a right to prove on the trial any matter that constituted an answer to the matter set up by the defendant as a defense, and the evidence that

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the release was obtained by fraud was a perfect answer to that instrument as a defense, it was established by the evidence. (*Id.*)

3. The principle that after the entry of a judgment in an action, and the issue of an execution thereon, the attorney for the plaintiff cannot bind him by directing the sheriff to make a levy upon the property of a third person, has no application to the case of an attorney procuring an attachment to be issued in the progress of an action and before the entry of judgment therein. (*Oestrich* agt. *Gilbert*, 9 *Hun*, 242.)

AWARD.

1. A court of equity will not set aside an award of arbitrators, for error *either in fact or law*, as to matters within their jurisdiction, and there must be something more than error of judgment, such as misconduct or corruption, or a mistake of law or fact in the nature of a clerical error, and in general to be available, *this must appear on the face of the award or in some paper delivered with it.* (*Halstead* agt. *Seaman*, *ante*, 415.)

2. The supreme court *has no general supervisory power over awards of arbitrators*, and where arbitrators keep within their jurisdiction, their awards, in the absence of *corruption or misconduct*, will not be set aside for errors of judgment, either as to the law or to the facts. (*Id.*)

3. The party alleging error must be able to show *from the award itself, that but for the mistake the award would have been different*, and unless restricted by the terms of the submission, arbitrators may disregard strict rules of law and evidence and decide according to their sense of equity. (*Id.*)

4. The merits of an award cannot be reinvestigated, and where corruption or misconduct has not been made out, nothing *dehors* the award can be pleaded or given in evidence, to invalidate it, however unreasonable or unjust it may be. (*Id.*)

5. An arbitrator has some power within his discretion, to determine how much evidence he will receive, but it is his general duty to hear all evidence *material* to the case, which is offered, and if arbitrators refuse to hear evidence *pertinent and material* to the controversy, it is such misconduct as will vitiate the award. (*Id.*)

6. To furnish ground for the setting aside of an award for the refusal of the arbitrators to hear evidence it must be clearly shown that the evidence offered was *pertinent, competent* and *material.* It is not enough that the party attacking the award swears that the evidence offered *was material*, to bring it within the rule. (*Id.*)

7. Where, as in this case, both parties were heard, each party giving his written statement of his version of the controversy to the arbitrators and no witnesses other than the parties were heard, and where by the terms of the submission it was agreed that "the arbitration should be conducted and decided upon the principle *of fair and honorable dealing between man and man:*"

Held, that under such a submission where each party was heard in his own behalf, the arbitrators were not guilty of *misconduct* in refusing to hear other evidence, but that in such refusal they acted in the exercise of a discretion vested in them, by law and by the submission, and that they have been guilty of no misconduct which should constrain a court of equity to interfere in the award. (*Id.*)

8. Where the parties to an action upon a promissory note submit the controversy to arbitrators, who award to the plaintiff thirty-five dollars, together with the costs to which he has been subjected in the action, such award is sufficiently definite and certain; as the amount of the costs will be fixed by the officer before whom they are to be taxed. (*Boughton* agt. *Seaman*, 9 *Hun*, 392.)

9. The fact that the action has been discontinued or abated by the submission to arbitration, so that no costs can thereafter be recovered therein, does not prevent the arbitrators from allowing the amount thereof to the plaintiff. (*Id.*)

10. Under the provisions of the act of 1870 (*chap.* 321, *Laws of* 1870), conferring upon the canal appraisers jurisdiction to hear and determine claims against the State for damages sustained from the canals of the state, or from the act of an officer having charge thereof, the appraisers had jurisdiction to hear and determine a claim of the character specified, however old, if presented and filed within the time prescribed by the act. (*People ex rel.* agt. *Thayer*, 63 *N. Y. R.*, 348.)

11. If, thus having jurisdiction, they erred in exercising it, and allowed a claim to which a good defense on the part of the state existed, their award is binding until reversed, and the auditor of the department has no authority to refuse payment. (*Id.*)

12. Upon application for a mandamus to compel the auditor to issue his draft in payment of an award made by the appraisers, it was objected that when a portion of the evidence upon the claim was taken, but one of the appraisers was present. *Held*, that this objection did not go to the jurisdiction of the appraisers, or the validity of the award; also, that under the provision of said act (*sec.* 3) requiring the board of appraisers to provide a general rule for the taking of evidence where the witness shall not be examined orally before the board, a rule authorizing evidence to be taken by one of their number in the absence of the others would be proper and valid; and that it was to be presumed that such a rule was made. (*Id.*)

BAIL.

1. A defendant may be held to bail in a second action commenced for the same cause as that of a previous action discontinued, where the second action is not vexatious. (*People* agt. *Tweed*, 63 *N. Y. R.*, 202.)

2. Whether it is so or not is a question of fact depending upon the circumstances, and the decision thereof is not reviewable here. (*Id.*)

3. The question as to the amount of bail is one of discretion for the court below, and its decision is not appealable. (*Id.*)

BANKRUPTCY.

1. The making of a general assignment, without preferences, under the state law does not, *per se*, contravene any provision of the bankruptcy act. That act was aimed at fraud and preference, and where neither of these are apparent there is no ground for claiming that an equitable distribution of the insolvent's estate is in violation of law. (*Haas* agt. *O'Brien*, *ante*, 27.)

2. The provisions of section 9 of article 1 of title 2 of chapter 18, part 1 of the Revised Statutes of this state, which regulate the distribution of the property of corporations *only* in cases of insolvency, actual or contemplated, is

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suspended or superseded by the bankrupt law of the United States. (*French* agt. *O'Brien*, *ante*, 394.)

3. The provisions of the Stilwell act are in direct conflict with those of the bankrupt law, and inasmuch as a bankrupt cannot comply with the requirements of the Stilwell act, he ought not to be subjected to its penalties. (*Matter of Goldstein*, *ante*, 426.)

4. After an adjudication in bankruptcy, the bankrupt acquires an undeniable claim to the protection of the United States court, and where a state court, as in this case, attempts to interfere by the issuance of a "Stilwell warrant," causing the arrest of the bankrupt, an injunction will issue enjoining the state courts from prosecuting under said warrant. (*Id.*)

5. As a general rule, leave will not be granted by this court to sue a receiver appointed by its authority, in any other tribunal. (*Matter of Platt*, *ante*, 468.)

6. It is only when special facts and circumstances are shown to exist which render a departure from the regular course and practice of the court advisable, that such leave will be given. (*Id.*)

7. A general assignment for the benefit of creditors, without preference, has been held by the court of appeals of this state to be perfectly valid and unassailable under the bankruptcy act; but the federal courts in this district have held directly the reverse (*See McDonald, assignee*, agt. *Moore et al.*, *N. Y. Weekly Digest, December* 25, 1876):

Held, that the power vested in the supreme court of the United States to review these decisions, does not abate the authority of the court of last resort in this state over its inferior tribunals, and hence, until this conflict is finally determined, the court should not grant leave to have its own officer sued in a tribunal which is known to administer the law in a different way from that which this court is bound to observe. (*Id.*)

8. Therefore, leave will not be granted an assignee in bankruptcy to sue, in the United States court, a receiver appointed by this court, the object of the suit being to cause him to turn over the property of the bankrupt in his hands as receiver, to the assignee in bankruptcy. (*Id.*)

9. A general assignment for the benefit of creditors, without giving priority, is superseded by proceedings in bankruptcy. *Dolson* agt. *Kerr*, *ante*, 481.)

10. Where a judgment is recovered by a creditor, in the ordinary course of practice of the courts, and without collusion between the creditor and debtor, for the purpose of giving such creditor priority over others, that judgment, and the levy under it, is good even as against an assignee in bankruptcy subsequently appointed. (*Id.*)

11. On the 11th day of August, 1873, S., being largely in debt, made a general assignment to the plaintiffs for the benefit of his creditors, sharing alike, and no creditor having priority, one over the other. On the same day, one F. commenced an action to recover, and recovered, a judgment upon a note which S. had given to him upon the purchase of a pair of horses, said judgment being recovered on the 3d day of September, 1873, and on the same day an execution was issued and a levy made upon the horses, and they were sold under the execution on the 12th day of September, 1873. The plaintiffs, the general assignees of S., commenced this action to recover the value of the horses on September 9th, 1873. October 11, 1873, after the levy had been made upon the prop-

erty under the execution of F., bankruptcy proceedings were commenced by A., one of the creditors of S., and a general assignee in bankruptcy was appointed January 22, 1874. The plaintiffs, on the 11th day of August, 1874, executed a paper writing to G., the assignee in bankruptcy, which writing is a full recognition of the regularity of the bankruptcy proceedings, that S. was adjudged a bankrupt, and that he, G., as assignee in bankruptcy, took the title which they, as general assignees, had acquired by the assignment:

Held, that the action could not be maintained by plaintiffs for their benefit, because the bankruptcy proceedings set aside their assignment *ab initio;* that they could not maintain the action in behalf of the general assignee in bankruptcy, because the recovery of F. was without collusion with S., to give him a priority; that F. was entitled to the priority which his levy gave him. (*Id.*)

12. The bankrupt is entitled, until the question of his discharge is settled, to be protected by the court in bankruptcy, except in the cases specified in the bankrupt law. That the creditors have not proved their claim in the bankruptcy does not affect the question. Section 5106 of the Revised Statutes relates to debts provable, which, of course, includes those which have not been proved. (*Matter of Schwartz*, *ante*, 518.)

13. Where a claim originates in contract, although fraudulently induced, and is prosecuted in an action sounding in damages, it continues to constitute a provable debt, even though the fraud must be proved to entitle the plaintiff to a recovery. (*Id.*)

14. The right to make a general assignment for the benefit of creditors is not suspended by the provisions of the bankrupt act, provided such assignment contains no preferences and is not made with intent to defraud the creditors of the assignors. (*Von Hein* agt. *Elkus*, 8 *Hun*, 516.)

Injunction — sheriff liable for release of levy on the property of a judgment debtor on his being adjudged a bankrupt. (*See Ansonia Brass and Copper Co.* agt. *Babbitt*, 8 *Hun*, 157.)

15. This action was brought by the assignees in bankruptcy of the firm of Campbell & Shaw to set aside, as fraudulent under the bankrupt act, a mortgage given by Campbell upon his individual property to the defendant Northup. The mortgage was given for an individual indebtedness of Campbell for money loaned to him by Northup prior to April, 1874, upon the parol agreement that a mortgage should be given to secure the same upon the request of Northup. The individual property of Campbell exceeded in value his individual debts. The mortgage was given August eleven, and the petition in bankruptcy filed September 10, 1874. (*Hewitt* agt. *Northup*, 9 *Hun*, 543.

16. Between these two dates judgments for large amounts were obtained against the firm. *Held*, that under well-settled principles of equity and the provisions of the bankrupt act, Northup was entitled to be paid out of the individual property of Campbell in preference to the firm creditors, and that the mere conversion of his equitable lien upon the individual property into a legal lien, by the giving of the mortgage, did not confer upon Northup any preference over the firm creditors forbidden by the bankrupt act. (*Id.*)

BILL OF PARTICULARS.

1. In an action brought by the attorney-general in the name of The

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People under the act of 1875 (chap. 49, *Laws of* 1875), to recover moneys alleged to have been fraudulently obtained from a municipal corporation, the ordering of a bill of particulars is in the discretion of the court below, and its decision is not reviewable here. (*People* agt. *Tweed*, 63 *N. Y. R.*, 194.)

BOARDING-HOUSE KEEPERS.

1. A boarding-house keeper is liable for the loss of his guest's goods, occasioned through the negligence of his own servants while they are acting within the scope of their employment. (*Smith* agt. *Read*, *ante*, 14.)

2. It is incumbent on a boarding-house keeper to exercise due and proper care of the baggage or property of his boarder — such care as a prudent person would take of his own property. (*Id.*)

3. It seems that the rule that a master is liable to third persons for the negligence of his servants while acting within the scope of their employment, is equally applicable to boarding-house keepers. (*Id.*)

BOND.

1. In an action for the alleged unlawful taking and conversion of property of plaintiffs, it appeared that the property was seized by the United States marshal as the property of K. & Co., by virtue of a provisional warrant in bankruptcy, issued in proceedings against that firm. Defendants were petitioning creditors, and it appeared that after the seizure they gave a bond to the marshal. The bond was not produced, and its form or the purpose for which it was given was not proved. *Held*, that the mere fact of giving a bond was but slight evidence connecting defendants with the tortious taking, and did not justify the withdrawal of that question from the jury. (*Welsh* agt. *Cochran*, 63 *N. Y. R.*, 181.)

BURDEN OF PROOF.

1. While a delivery is not necessary to pass the title to personal property, the failure to take possession of the property alleged to have been sold, throws the burden of proof on the purchaser to establish that the sale was made in good faith, as between such purchaser and a judgment creditor of the seller, who has issued execution and levied on the property. (*Schoonmaker* agt. *Vervalen*, 9 *Hun*, 138.)

2. Where property is claimed to be exempt from execution, the burden of proof rests upon the party claiming such exemption. (*Brown* agt. *Davis*, 9 *Hun*, 43.)

CAUSE OF ACTION.

1. The complaint alleged that the defendant, by J. S. McClure, her agent, made and delivered *her* promissory note, in writing, setting forth a copy of the note, signed J. S. McClure, agent, and alleging that the consideration of the note was goods sold to the defendant. The defendant demurred. The demurrer was sustained at special term on the grounds that the note did not refer to the defendant by name, and did not show that McClure had authority to sign as her agent. *Held*, that the complaint stated facts sufficient to constitute a cause of action. (*Moore* agt. *McClure*, 8 *Hun*, 557.)

2. That, under the allegation that the defendant made and delivered *her* promissory note, it would be competent to show that the person

signing the note was duly authorized by her so to do. (*Id.*)

3. The fact that the name of the defendant did not appear upon the face of the note, would not prevent the plaintiff from introducing evidence to show that she was bound thereby. (*Id.*)

4. An action cannot be maintained to cancel, as a cloud upon title, a recorded executory contract for the sale of land, executed by one claiming to act as agent for the owner, upon the ground that the person executing it had no authority; the defect would necessarily appear in any proceeding by one claiming under the contract to enforce it, as he would be required to prove the authority of the agent. (*Washburn* agt. *Burnham*, 63 *N. Y. R.*, 132.)

5. An heir at law or next of kin claiming in hostility to a will, cannot maintain an action to obtain a construction thereof. (*Chipman* agt. *Montgomery*, 63 *N. Y. R.*, 221.)

6. An action cannot be maintained by an individual claiming to hold a municipal office, to determine his right thereto, when it does not appear that any person claims the office in hostility to him, or that there has been any interference by the defendant with his legal rights as officer. (*Demarest* agt. *Wickham*, 63 *N. Y. R.*, 320.)

7. The heirs or next of kin of a deceased person can only be made liable upon his contracts or for his debts in the cases and in the manner prescribed by statute. (*Selover* agt. *Coe*, 63 *N. Y. R.*, 438.)

8. No liability can be upheld against heirs at law unless it is made to appear that the deceased left no personal assets within the state to be administered, out of which the debt could be collected, or that the personal assets have been disposed of and appropriated toward the payment of the obligation (2 *R. S.*, 452, *sec.* 33, *as amended by chap.* 110, *Laws of* 1859). (*Id.*)

9. No action can be brought against next of kin, save where the creditor has neglected to present his claim to the personal representatives of the deceased (2 *R. S.*, 90, *sec.* 42). (*Id.*)

10. An equitable action may be maintained to prevent a cloud upon title to lands, but it must be made to appear that there is a determination to create the cloud; it is not sufficient that the danger is merely speculative. (*Sanders* agt. *Village of Yonkers*, 63 *N. Y. R.*, 489.

CERTIORARI.

1. Upon a common-law *certiorari* the supreme court is not restricted to the jurisdiction of the inferior tribunal over the parties and the subject-matter, but it is the duty of the court in addition thereto to examine the evidence and determine whether there was any competent proof of the facts nec essary to authorize the adjudication made, and whether in making it any rule of law affecting the rights of the parties has been violated. (*People ex rel. Miller* agt. *Board of Police Commissioners*, *ante*, 289.)

2. A member of the police force of the city of New York can only be removed by the board of commissioners after written charges have been preferred against him, and after the charges have been publicly examined into, upon reasonable notice to him, and in such manner as the rules and regulations of the board of police may prescribe. (*Id.*)

3. On the 5th day of February, 1875, notice of the charge, together with a copy of the charge and specification, was served upon the relator, which notice stated that the

trial would take place at the office of the board of police on the 10th day of February, 1875. The relator admitted due personal service of the charge, specification and notice of trial, and he also signed the following admission: "I hereby admit the within charge as specified, and waive trial thereon." On the eighth day of February, two days before the trial, the relator delivered to the commissioners a sworn statement, denying his guilt, recanting and withdrawing the admission previously made, revoking the waiver of trial, denying and fully answering the charges, and fully explaining the reason why, and the circumstances under which the admission was made:

Held, that the board of commissioners were guilty of error in refusing to consider the explanatory affidavits submitted by the relator, and in removing him from his office on the strength of an admission which he never intended to make, and which he withdrew before the day appointed for the trial and examination of his case. There was no trial or examination, and the dismissal was illegal. (*Id.*)

4. The writ of *certiorari* is an appropriate remedy to review proceedings for the opening and grading of streets. Although there is no statutory limitation of the time within which the writ must be obtained, it is not one of right, and the court can, in its discretion, refuse it in any case, and quash it where it has been improperly granted. (*People ex rel. Ackerly* agt. *City of Brooklyn*, 8 *Hun*, 56.)

5. The general rule has been to quash the writ where application therefor has not been made in due season, and due season has usually been limited to two years. (*Id.*)

6. When property is generally assessed at one-third its value, in violation of the assessors' duty the court will not reduce the assessment of property assessed at a greater value, to the same proportion. (*People ex rel. R. W. and O. R. R. Co.* agt. *Dixon*, 8 *Hun*, 178.)

CHARGE.

1. The refusal of a request to charge what has already been charged is not error, although the court neglects to give that as a reason for its refusal. (*Spencer* agt. *Humiston*, 9 *Hun*, 71.)

CIRCUIT COURT.

1. Where the foreman of a jury, by mistake, announces a verdict different from that agreed to by the jury, and the erroneous statement is taken and recorded, the court, upon application made at the same circuit immediately after the entry of the erroneous verdict, has power to correct the record so as to make the verdict conform to the actual finding. (*Dalrymple* agt. *Williams*, 63 *N. Y. R.*, 361.)

CITY RAILROADS OF NEW YORK.

1. By an ordinance of the common council, duly enacted and passed the 31st day of December, 1858, it is required, that each and every passenger railroad car running in the city of New York, below One Hundred and Twenty-fifth street, shall pay a license fee of five dollars, except the small one-horse cars, which shall each pay twenty-five dollars annually as such license. The defendant has operated and controlled its railroad, by virtue of an act of the legislature passed April 17th, 1860 (*Laws of* 1860, *chap.* 515), the second section of which provides, that "said railroad * * * shall be subject to such reasonable rules and

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regulations in respect thereto, as the common council of the city of New York may, from time to time, by ordinance prescribe, *and to the payment to the city of the same license fee annually for each car run thereon, as is now paid by other city railroads in said city:*"

Held, that the liability of defendants does not depend upon the fact that the other railroads have *actually paid* their license fee into the city treasury, but upon the fact that they were required and legally liable to pay such fees; that the statute should be interpreted as if it read "and to the payment to the city of the same license fee annually for each car run thereon as is now *required* to be paid by other railroads in said city." (*The Mayor* agt. *Forty-second and Grand St. R. R. Co.*, *ante*, 106.)

2. Although there is no distinct averment in the complaint that the other railroads in the city of New York, at the times mentioned in the complaint, were *actually* paying to the city the amount prescribed by the ordinance alleged in the complaint, or any sum whatever, it is not for this reason defective. (*Id.*)

3. It is perfectly competent for the legislature to validate an invalid ordinance, and, although there seems to be some doubt as to the power of the common council to pass such an ordinance as that of 1858, it being an ordinance for revenue purposes only and not for police and internal government, still the legislature, by the act of 1860, under which the defendants acquired their right to run cars through the streets, recognized the validity of the ordinance of 1858.

CODE.

Section 85 — Substantial inclosure — usually cultivated and improved — what constitutes. (*See Pope* agt. *Hanmer*, 8 *Hun*, 265.)

Section 113 — Action to recover town moneys must be brought by supervisor. (*See Town of Chautauqua* agt. *Gifford*, 8 *Hun*, 152.)

Section 119 — Construction of, as to right of stockholder to bring action against trustees and company. (*See Young* agt. *Drake*, 8 *Hun*, 61.)

Section 120 — Lessee and surety — can be sued jointly under. (*See Decker* agt. *Gaylord*, 8 *Hun*, 110.)

Section 122 — Interpleader — supplemental complaint. (*See Wilson* agt. *Lawrence*, 8 *Hun*, 593.)

Section 144, subdivision 6 — Cause of action under — means any cause of action. (*See Mackey* agt. *Auer*, 8 *Hun*, 180.)

Sections 274, 287 provide the same remedy by judgment and execution against a married woman, as the law affords against other persons, with the single qualification, that the execution can be levied and collected only out of her separate property. (*See Andrews* agt. *Monlaws*, 8 *Hun*, 65.)

Section 304 — Costs when title to real property is involved — certificate of county judge that the title to land came in question on the trial, is conclusive on the taxing officer. (*See Lillis* agt. *O'Conner*, 8 *Hun*, 280.)

Section 341 — Sale in foreclosure may be adjourned after stay of proceedings on appeal — until it can be determined whether or not the sureties will justify. (*See Ward* agt. *James*, 8 *Hun*, 526.)

1. Sections 352, 355 — On appeal from a justice's court, before the act of 1863 (*chapter* 392) security was only required when a stay of execution was desired; since that act, where, by the terms of section 352, the appellant is entitled to a new trial, security is required to perfect such appeal and give juris-

diction thereon to the county court. (*Kuntz* agt. *Licht*, 8 *Hun*, 14.)

2. Section 391 — Where a party, required to attend before a judge or referee to be examined as a witness, in pursuance of section 391 of the Code, has appeared in the action by an attorney, notice of the examination should be served upon the attorney as well as upon the party. (*Plummer* agt. *Belden*, 8 *Hun*, 455.)

Section 399 — Party to transaction — cannot testify as to intention with which an act was done, as against legal representatives of other party. (*See Tooley* agt. *Bacon*, 8 *Hun*, 176.)

Section 399 — Next of kin incompetent under — though called to testify against his interest (*See Le Clare* agt. *Stewart*, 8 *Hun*, 127.)

Section 432 — *Quo warranto* — attorney-general cannot be compelled to bring action of. (*See People ex rel. Demarest* agt. *Fairchild*, 8 *Hun*, 334.)

Section 449 — Conflicting claims to real property — action to determine — costs in, on dismissal of complaint. (*See Rugen* agt. *Collins*, 8 *Hun*, 384.)

Section 59 — Title to land, when in question — justice's court. (*See Ryan* agt. *Harrigan*, 9 *Hun*, 520.)

Section 105 — As to limitation of time for bringing action — not applicable to limitations imposed by contract. (*See Wilkinson* agt. *First National Fire Ins. Co.*, 9 *Hun*, 522.)

Section 122 — Authorizing the bringing in of additional parties, only applies to equitable actions. (*See Webster* agt. *Bond*, 9 *Hun*, 437.)

3. Section 178 — Where an action is brought by one tenant in common against his co-tenant to recover for the use and occupation of an undivided one-third of a certain farm held in common by them, a referee has no power, under section 178 of the Code, to allow the complaint to be so amended upon the trial as to convert the action into the action for an account, or for money had and received authorized by the Revised Statutes. (*Joslyn* agt. *Joslyn*, 9 *Hun*, 388.)

4. Section 179 — Defendant, having in his hands certain malt consigned to him for sale by the plaintiff, accepted a draft in favor of a third person drawn on him by the latter on account thereof. Subsequently he sold the malt, but neglected to pay the draft, which the plaintiff was afterward compelled to take up. In an action by the latter to recover the proceeds received upon the sale of the malt, *held*, that the defendant did not cease to be a factor or agent of the plaintiff upon the acceptance of the draft, and that an order of arrest was properly granted, on the ground that he had received the money in a fiduciary capacity. (*Kelly* agt. *Scripture*, 9 *Hun*, 283.)

Section 179, subdivision 3 — An action to recover the possession of personal property may be maintained, and an order of arrest obtained, although before the action is brought the defendant has, in fact, disposed of and fully parted therewith. (*See Barnett* agt. *Selling*, 9 *Hun*, 236.)

5. Section 216 — Where, while personal property seized by a coroner in an action to recover the possession thereof from the sheriff, who had held it under an execution, was still in the coroner's possession, a notice of claim thereto by a third person, together with the affidavit required by section 216 of the Code, was served upon the coroner, and he thereafter, upon receiving a bond of indemnity, delivered the same to the party at whose instance it was seized by him, *held*,

that he thereby rendered himself liable to an action for the conversion thereof by the party serving the notice of claim. (*Manning* agt. *Keenan*, 9 *Hun*, 686.)

6. Section 216 — Where coroners provide an office and have there a person to whom is intrusted the entire charge of the office business, and of the service of process, a delivery to him of a notice of claim to personal property, and of the affidavit required by section 216 of the Code, is legally a delivery thereof to them. (*Id.*)

7. Section 227 — Although section 227 of the Code authorizes attachments to be issued in actions arising on contract for the recovery of money only, or in actions for the wrongful conversion of personal property, yet an attachment cannot issue in an action in which the complaint sets forth several causes of action, some of which belong to neither of the two classes therein described. (*Mining Co.* agt. *Raht*, 9 *Hun*, 208.)

Section 243 — Fees of sheriff on attachment — not repealed by chapter 415 of 1871, as amended by chapter 26 of 1872. (*See German American Bank* agt. *P. and E. Coal Co.*, 9 *Hun*, 205.)

Section 271 — Examination of a long account — what action not referable under, on the ground that it requires. (*See McDonnell* agt. *Stevens*, 9 *Hun*, 28.)

Section 292 — Supplementary proceeding — examination of non-resident debtor — may be had in county where he carries on business, (*See Anway* agt. *David*, 9 *Hun*, 296.)

Section 303 — Abrogated all rules and provisions of law, preventing an attorney from agreeing with his client for the measure or mode of his compensation, and left the same to the agreement of parties, express or implied. (*See Brown* agt. *Mayor*, 9 *Hun*, 587.)

Section 304 — Costs in equitable actions — where each party succeeds in part — allowance of, reviewable. (*See Law* agt. *McDonald*, 9 *Hun*, 23.)

Section 309 — Extra allowance — basis for. (*See Murray* agt. *Robinson*, 9 *Hun*, 137.)

8. Section 399 — The exception therein allowing a party to testify as to any communication as to which the testimony of the deceased party has been given in evidence, only applies to cases in which such testimony is given by the adverse party, and not by the one who offers himself as a witness to testify to such transaction. (*Miller* agt. *Adkins*, 9 *Hun*, 9.)

9. Section 399 — In an action to recover for legal services rendered to the defendants' intestate by the plaintiff, the latter was allowed, against the defendants' objections and exceptions, to state that the service consisted of counsel and advice given by him to the deceased in relation to several matters, and that during a specified time he considered himself the counsel of the deceased. *Held*, that the evidence was inadmissible, as relating to personal transactions or communications with deceased. (*Somerville* agt. *Crook*, 9 *Hun*, 664.)

COMMISSIONERS.

1. In an action by commissioners appointed to open and widen streets in the city of New York, under the act of 1813, it is not necessary to allege in the complaint, or to prove upon the trial, that their report has been confirmed by the court. (*Blunt* agt. *Mayor*, 9 *Hun*, 330.)

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COMMISSIONERS OF HIGHWAYS.

1. It is the duty of commissioners of highways of towns to keep in repair the highways of the town, and as they and the inhabitants of the town are empowered to raise the necessary means for such purpose, in an ordinary case of a highway out of repair, and injuries resulting therefrom, the town through its commissioners should be held responsible. (*Roe* agt. *Elmendorf*, *ante*, 282.)

2. A *railroad company* organized under the general statute of this state is required in *crossing a highway* to restore the highway thus crossed to its former state, or to such state as not necessarily to impair its usefulness. (*Id.*)

3. And where it becomes necessary for such company to dig a *trench* across a highway for the construction of its railway, which is *bridged* to keep up the highway, the railroad company are bound to *continue such bridge in repair* as long as the highway exists, and the corporation is allowed to enjoy the lawful exercise of its franchise. The duty in such case must be an *ever-continuing one*. (*Id.*)

4. The remedy against commissioners of highways of a town depends upon their neglect of duty, and where the law had permitted a railroad company to excavate the highway, so that it needed to be bridged, and had also imposed upon such corporation the duty of keeping such bridge in repair, the neglect of which duty by the company, and not neglect by the commissioners, caused the injury, *held*, that the commissioners were not responsible. In such case the liability of the town ceases:

Held, *also*, that the act of 1855, entitled "an act to enlarge the powers and duties of commissioners of highways" (*chap.* 255 *of Laws of* 1855), which enables the commissioners to sue and recover such damages as the town is compelled to pay by reason of the non-performance of duty of a railroad company, does not alter or increase their responsibility, so as to render them liable for damages, where they were not so liable, previous to the passage of this act. (*Id.*)

5. *It seems*, however, that where commissioners of highways have been, as in this case, exceedingly remiss in the discharge of their official duties, there is a remedy against them by trial and punishment by indictment. (*Id.*)

COMMON CARRIERS.

1. Where goods are shipped under a verbal agreement for their transportation, such agreement is not merged in a bill of lading, which is partly written and partly printed, delivered to the shipper after he has parted with the control of his goods, notwithstanding such bill of lading, by its terms, limits the liability of the carrier, and expresses, on its face, that by accepting it the shipper agrees to its conditions. The mere receipt of the bill, after the verbal agreement had been acted upon, is not sufficient to conclude him from showing what the actual agreement was, under which the goods had been shipped. (*Schiff* agt. *New York Central and H. R. R. Co.*, *ante*, 91.)

2. When the contract for transportation is over the lines of several distinct and independent companies, it is perfectly competent for those companies to limit their liability by contract as expressed in the bill of lading. (*Id.*)

3. Where a bill of lading contained a provision in substance that no connecting carrier should be held liable for any loss or damage to goods, except what occurred on

its own route, and it was shown, by proof, that the damage occurred after the defendants had delivered the goods safely, and in good time, order and condition to a connecting company or carrier, any right of action which may have accrued to the plaintiff does not exist against the defendants. (*Id.*)

COMPENSATION.

1. Section 303 of the Code abrogated all rules and provisions of law preventing an attorney from agreeing with his client for the measure or mode of his compensation, and left the same to the agreement of the parties, express or implied. (*Brown* agt. *The Mayor*, 9 *Hun*, 587.)

COMPLAINT.

1. Where a complaint alleges that the United States Proprietary Medicine Company was a joint stock company, duly incorporated under the provisions of a statute of the state of Ohio; that at the time mentioned in the complaint the company was and still is insolvent, stating the acts of insolvency; that the act under which the company was incorporated contains a provision that all stockholders shall be deemed and held liable to an amount equal to their stock subscribed, in addition to said stock, for the purpose of securing the creditors of said company; that the defendant was a stockholder owning shares of stock; also the due and proper appointment of the plaintiff as receiver in an action in the courts of Ohio; and an order made whereby he was directed to proceed at once to collect by suit the statutory liabilities of stockholders residing without the jurisdiction of said court by bringing suit against them in the proper courts of the states in which they reside: *held*, to be a complete statement of the cause of action. (*Pugh* agt. *Hurtt*, *ante*, 22.)

See CITY RAILROADS OF NEW YORK.
The Mayor agt. *The Forty-second and Grand Street R. R. Co.*, *ante*, 106.

See ATTACHMENT.
Wilson agt. *Harvey*, *ante*, 126.

2. Where a complaint alleged that defendants received from the plaintiff his promissory note for $534, indorsed by one Sanborn, upon the agreement that they would return the same before maturity; the maturity of the note; a failure to return the same and a sale thereof by defendants before maturity, *held*, that it stated facts sufficient to constitute a cause of action. (*Loomis* agt. *Mowry*, 8 *Hun*, 311.)

3. The presumption is, that the value of a promissory note is the face thereof. (*Id.*)

4. A complaint in an action against a husband and wife upon a bond, set forth a copy of the bond, in which she was described as the wife of the defendant James. *Held*, that this did not amount to an allegation that she was the wife of the defendant James, but merely that she executed a paper in which she was so described. (*Broome* agt. *Taylor*, 9 *Hun*, 155.)

CONFLICTING CLAIMS.

1. Where, in an action brought in pursuance of section 449 of the Code, to determine conflicting claims to real property, the plaintiff's complaint is dismissed, the defendant is entitled to costs, as a matter of right, and the court cannot prevent his recovering the same. (*Rugen* agt. *Collins*, 8 *Hun*, 384.)

Digest.

CONFLICTING EVIDENCE.

1. Where it becomes necessary for the court to pass upon the weight of conflicting evidence, it will consider letters written by a party, and acts performed by him contradictory of his oath, as rendering such oath of no consideration. (*Lynch* agt. *Pyne*, *ante*, 435.)

CONFLICTING DECISIONS.

1. Upon an appeal from a judgment entered upon an order dismissing the complaint in this action, the commission of appeals granted a new trial, holding that upon the facts proved the action could be maintained; after the argument, and before the decision of this case, the court of appeals, in a case then before it, decided that such an action could not be maintained. Upon this case coming on for a new trial, *held*, that, as the court of appeals had decided that such an action could not be maintained, such decision became the law of the state, and as such binding upon this court and the parties to this action, and that a judgment entered upon an order dismissing the complaint herein was proper, and should be affirmed (DAVIS, *P. J.*, *dissenting*). (*Mechanics and Traders' Bank* agt. *Dakin*, 8 *Hun*, 431.)

2. Upon appeal from a judgment of nonsuit entered in this action, the commission of appeals reversed the judgment, holding that upon the facts proved the plaintiff was entitled to recover. Subsequently the court of appeals, in another case, held that upon the same facts the plaintiff could not recover. Upon this case coming on for a new trial, *held*, that it was the duty of the court to follow the decision of the court of appeals, although a different rule was laid down therein than had been previously declared by the commission of appeals in this case. (*Supervisors of Delaware* agt. *Foote*, 9 *Hun*, 527.)

CONSTITUTIONAL LAW.

1. Where the title of an act fairly and reasonably announces the subject, and that is a single one, if the various parts thereof have respect or relate to that subject, it is a compliance with the provision of the Constitution, that "no local or private bill shall embrace more than one subject, and that shall be expressed in its title" (*State Constitution*, *art.* 3, *sec.* 16). (*Hurlburt* agt. *Banks*, *ante*, 196.)

2. The scope, the object of the bill need not be stated in the title, but the "subject," *i. e.*, the thing legislated upon, must be disclosed, and the act can embrace only that one. What the act proposes to do with the "subject" need not be stated in its title, nor the machinery to be put in operation disclosed. It is enough if the subject of legislation be stated. (*Id.*)

3. The general subject of local improvements includes not only the plan and construction of contemplated work, but the means by which the work may be accomplished, the proceedings necessary to be adopted for assessing and paying the expenses, and the remedies to parties for redress of grievances arising out of their construction:

Held, therefore, that the act entitled "An act in relation to that portion of the Great Western turnpike road, commonly known as Western avenue, lying between Snipe street, in the city of Albany, on the east, and the west line of the proposed new boulevard, intersecting the said road west of Allen street, in the said city, on the west" (*chap.* 445, *Laws of* 1876), is not in violation of said

constitutional provision, and an injunction restraining the issuing of bonds pursuant to its provisions will not be granted.

Held, second, that the act, although it provides that the assessment, which is to be made upon the owners of property fronting upon the avenue, shall be made as prescribed in certain other laws therein referred to, is not in conflict with the provision of the Constitution which declares that "no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed to be a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act" (*State Constitution, art. 3, sec. 17*).

Held, third, that the provision of the Constitution which declares that "the legislature shall not pass a private or local bill in any of the following cases: * * * Laying out, opening, altering, working or discontinuing roads, highways or alleys, or for draining swamps or other low lands" (*State Constitution, art. 3, sec. 18*), does not apply to this case. That provision refers to the ordinary "roads, highways or alleys," the manner of opening, working, altering or discontinuing of which can be readily provided for by general law.

Held, fourth, that the act is not obnoxious to any objection founded upon article 3, section 20 of the State Constitution, because it fails "to distinctly state the tax." It does state the tax; it cannot exceed $185,000.

Held, fifth, that the act does not contravene the provision of article 8, section 11 of the State Constitution, which declares, "no county, city, town or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become, directly or indirectly, the owner of stock in, or bonds of any association or corporation, nor shall any such county, city, town or village be allowed to incur any indebtedness, except for county, city, town or village purposes This section shall not prevent such county, city, town or village from making such provision for the aid and support of its poor as may be authorized by law." The debt to be paid or liability to be extinguished in this case is not that of the individual tax-payers, but of the municipality. (*Id.*)

4. An order by a competent tribunal committing a child found in an employment contrary to the act of 1876, to prevent and punish wrongs to children (*Laws of* 1876, *chap.* 122, *p.* 95), is a final judgment in the matter, within the meaning of the *habeas corpus* act. (*Matter of Donohue, ante*, 251.)

5. The constitutionality of the statute under which the commitment was made cannot be impeached upon *habeas corpus* proceedings, as this would be inquiring into the *legality* of the judgment. (*Id.*)

6. By section 3 of the act of 1876, which authorizes any court or magistrate to commit to an asylum, &c., any child engaged or used in violation of the act, the recorder of the city of Poughkeepsie had full power to commit these children to the care of the New York Society for the Prevention of Cruelty to Children. (*Id.*)

7. The act of 1876 (*Laws of* 1876, *p.* 95, *chap.* 122), entitled "An act to prevent and punish wrongs to children," *held*, to be constitutional. (*Id.*)

8. The act entitled "an act to preserve the public peace and order on the first day of the week, commonly called Sunday" (*Laws of* 1860, *chap.* 501), does not violate section 16 of article 3 of the Constitution, which declares that "no

private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." (*Neuendorff* agt. *Duryea*, *ante*, 267.)

9. The constitutional power of the legislature to enact laws for regulating the observance of the Sabbath cannot be questioned. (*Id.*)

10. It is competent for the legislature to determine and declare what recreations or diversions are harmless and innocent, and therefore lawful, and what amusements operate injuriously upon others or exert a baneful influence upon the community, and thus tend to a breach of the peace, and should, for that reason, be prohibited. And if the legislature, in their wisdom, come to the conclusion that certain pastimes or amusements are hurtful or injurious to others, and tend to disturb the peace and tranquillity of the public, the courts will not ordinarily, even if they have the power to do so, sit in review of the judgment and discretion exercised by the law-making power. (*Id.*)

11. The words "to preserve the public peace and order," in the title of the act of 1860, properly express its object. (*Id.*)

12. It is not necessary that the title of an act should declare the subject thereof in the most apt and expressive language that could be chosen. If the subject of the act is honestly and reasonably indicated by its title, the constitutional requirement will be fully complied with. (*Id.*)

13. A solemn act of the legislature should not be declared unconstitutional and set aside by the courts on slight grounds. (*Id.*)

14. The case of *Durkee* agt. *The City of Janesville* (26 *Wis.*, 697) reviewed and distinguished. (*Id.*)

CONTEMPT.

1. Defendant having been imprisoned under an order adjudging him guilty of a contempt, was discharged on the ground that the punishment inflicted by the order was unauthorized. Subsequently he was again brought before the county judge, retried and resentenced for the same contempt, and additional and more severe penalties imposed upon him. *Held*, that it was error to retry him for the same contempt, and impose upon him new and different penalties. (*Snyder* agt. *Van Ingen*, 9 *Hun*, 569.)

Failure of defendant to appear in supplementary proceedings — amount of fine — what proper. (*See Reynolds* agt. *Gilchrest*, 9 *Hun*, 203.)

CONTRACT.

1. Where the contract for the sale and delivery of goods, wares and merchandise is executory and there is no express warranty, the vendee must examine the article furnished as soon after he has accepted the same as practicable; and in case it does not correspond with the contract he must immediately return or offer to return it to the vendor, or at least notify him of the defects; and if he fails so to do he will be presumed to have accepted it in full performance of the contract, and waives any claim for damages he may have by reason of the breach. (*Greenthal* agt. *Schneider*, *ante*, 133.)

2. Where, upon a sale of a large quantity of butter, it was shown upon the part of the defendant that when the plaintiff first offered the butter for sale he stated that it was "good, excellent butter:"

Held, that this statement was merely descriptive of the quality of the article proposed to be sold, but not amounting to a warranty.

Digest.

Held, also, that even if an express warranty could be predicated upon the representations made respecting the butter, it would, in this case, only go to the extent that the article itself was of a particular kind or quality, and not that it was fit and suitable for the use to which the defendant applied it. (*Id.*)

3. A contract for lobby services, for personal influence, for mere importunity, to members of the legislature or other official body, for bribery or corruption or for seducing or influencing them, by any other arguments, persuasions or inducements than such as bear directly and legitimately upon the merits of the pending application, is *illegal* and against public policy and *void*. (*McKee* agt. *Cheney*, *ante*, 144.)

4. It is not necessary to adjudge that the parties stipulated for corrupt action or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results. (*Id.*)

5. Where the defendant's claim required the passage of an act of congress before it could be paid, the plaintiff, in substance, agreeing to collect that claim, and as a part of the service to be performed by him agreed to procure the passage of an act of congress, also agreed to importune and solicit, and in fact did importune and solicit, various members of the house of representatives; that he brought not only his personal influence to bear upon such members to secure the passage of the act, but also brought the personal influence of others to bear upon them to that end and for that purpose:

Held, that the claim was *void* as against public policy.

Held, also, that although the plaintiff sues upon an agreement made after the passage of the act of congress was procured, the consideration of the agreement, or a part of the consideration, was the service rendered by the plaintiff in procuring the passage of the act. The previous agreement as to those services being void as against public policy, the execution of a new agreement or a subsequent promise to pay for such services does not better the plaintiff's position. (*Id.*)

6. Where, under a contract in writing, for the delivery of a deed of land, and the payment of the consideration, on or before a day named, the party whose duty it was to deliver the deed, before the day named, applied to the party who was to pay the consideration, to name a time and place for performance, and such party remained silent; and where, under such circumstances, the party first named prepared and executed the conveyance, and made all reasonable efforts to find and communicate with the other party to complete the agreement, but which efforts, through the acts and omissions of the other party, were unavailing, such acts and omissions are a waiver of a formal tender. (*Buess* agt. *Koch*, *ante*, 478.)

7. Upon the breach of a valid contract, the plaintiff is entitled to recover some damages, the amount to be determined upon the trial. (*Id.*)

8. Plaintiff and defendant entered into an agreement whereby the former was to furnish rooms and board for the defendant and his family for one year, from March 24, 1875. Defendant left the house on May 27, 1875, without sufficient reason therefor. Afterwards and before August twentieth plaintiff for a time had boarders in defendant's rooms. August twentieth plaintiff gave up the house. *Held*, that the plaintiff was entitled to bring an action for the breach of the contract without waiting for

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the expiration of the year, and that in such action she could only recover the damages suffered at the time of the commencement thereof. (*Wetmore* agt. *Jaffray*, 9 *Hun*, 140.)

9. The damages, in such an action, would be the profits that she would have made up to August twentieth, had the defendant performed the contract on his part, deducting the profits on the boarders put in defendant's rooms. (*Id.*)

10. The contract provided that in case of the absence of the defendant and his family only half the price should be paid. *Held*, that this only applies in case he retained the rooms, and that he could not claim an allowance therefor after he had wholly abandoned the contract on his part. (*Id.*)

SURETIES.

People ex rel. McKone agt. *Green*, *ante*, 306.

CORPORATIONS.

1. A resolution regulating, generally, the duties of the president of a savings bank, which duties were already carefully defined by the by-laws, and which by-laws provide that they can only be amended in a certain manner (*i. e.*), after giving the notice and taking the steps required by the by-laws, is not valid where no such notice is given. Such resolution confers no authority on the president. (*French* agt. *O'Brien*, *ante*, 394.)

2. A person dealing with an officer of a corporation, whose duties are regulated by the by-laws, is chargeable with notice of his authority, and of the limitations and restrictions upon it contained in the act of incorporation and by-laws. (*Id.*)

3. A subsequent ratification by the trustees of the president's acts, will not be inferred in the absence of proof showing that the board of trustees had notice or knowledge of the unauthorized acts of its president. (*Id.*)

4. The provisions of section 9 of article 1 of title 2 of chapter 18, part 1 of the Revised Statutes of this state, which regulate the distribution of the property of corporations *only* in cases of insolvency, actual or contemplated, is suspended or superseded by the bankrupt law of the United States. (*Id.*)

5. Where a bond and mortgage is transferred partly in payment of a precedent debt, and partly for a consideration paid at the time, the purchaser will not be regarded as a holder for value as against one having the legal title or a prior equity, so far as the assignment was received in payment of the precedent debt, but is entitled to a lien for the amount of the consideration paid, and to a repayment of that amount before he will be required to reconvey the bond and mortgage. (*Id.*)

6. The defendant was a depositor in the People's Savings Bank. On November 3, 1875, he purchased of said bank (through its president) a certain bond and mortgage held and owned by the bank, paying for said bond and mortgage $14,389.78 cash, and being debited on the books of said bank the amount of his balance on deposit, $10,821.18. At the time of the purchase and transfer, the bank was insolvent (though not known so to be by the defendant). (*Id.*)

7. In an action by the plaintiff as receiver of the bank for an accounting for the bond and mortgage and the value and proceeds thereof, and for an injunction restraining the defendant from assigning or creating any lien upon the same, and asking for the

appointment of a receiver of the bond and mortgage:

Held, first, that the suit is of an equitable character, and such as would in former times have been cognizable by the court of chancery.

Second, that the action being one of an equitable character, the principle that one who comes into a court of equity must come prepared to do equity, and to refund as much as he has received upon a transaction which is voidable and void, applies.

Third, the claim that the plaintiff in such case should do equity, by putting the defendant in the position in which he stood before the transaction was consummated, is not a *set-off* or *counter-claim*, and therefore need not be pleaded.

Held, also, that the defendant should assign the bond and mortgage to the plaintiff, on receiving from him the sum of $14,889.78, with interest, and being reinstated as a creditor upon the books of the bank in the sum of $10,821.18. (*Id.*)

8. Under the provisions of chapter 442 of 1876, authorizing the dissolution of a corporation in case the trustees are unable to agree as to the management thereof, the court may, in proper cases, direct the assets remaining after the payment of the expenses of the receivership and of the debts and liabilities of the corporation, to be sold and the proceeds divided among the stockholders. (*Matter of Woven Tape Skirt Co.*, 8 *Hun*, 508.)

9. This action was brought to charge the defendant, as a trustee of a corporation, for a debt due therefrom, on the ground that no report had been filed as required by law. Upon the trial the defendant gave in evidence against plaintiff's objection and exception, a judgment roll in an action by the plaintiff against the corporation to recover the same debt, in which a judgment was rendered for the corporation upon its merits. *Held*, that the judgment roll was properly received, and that it was conclusive against the plaintiff's right to recover in this action. (*Tyng* agt. *Clarke*, 9 *Hun*, 269.)

CORPORATION (NEW YORK CITY).

1. The corporation of the city of New York, as owners of the wharves and piers, are liable for any loss or damage sustained by reason of their defective construction or dangerous condition. (*Mc Guiness* agt. *Mayor*, *ante*, 450.)

2. The common council are the exponents of the will of the corporation, and the settlement or compromising of a legal claim for damages falls within their lawful powers. (*Id.*)

3. Plaintiff presented his claim to the common council for damages, in the sum of $400, for the loss of his horse and cart from one of the wharves owned by defendants. The common council passed a resolution allowing to plaintiff the sum of $350, to be paid by the comptroller from the appropriation for city contingencies, or any other appropriate account:

Held, that the resolution was not the incurring of expense by any of the departments or by the officers thereof. It was a direction to pay a liability which the law imposed upon defendants, which liability was settled and compromised at the amount specified in the resolution; therefore section 101 of the charter of 1870, which provides "that no expense should be incurred unless an appropriation shall have been previously made covering such expense," does not apply. (*Id.*)

Digest.

COSTS.

1. A writ of *habeas corpus* is a special proceeding within the meaning of section 8 of the Code. (*Matter of Barnett*, *ante*, 73.)

2. Costs are allowable in the discretion of the court, and when so allowed shall be at the rate allowed for similar services in civil actions. (*Id.*)

3. No extra allowance can be allowed; that relates only to actions. (*Id.*)

4. Upon taxation of costs, in an action tried by a referee, the clerk has no right to question the regularity of the referee's report. His decision, awarding judgment, stands before the clerk as the mandate of the court, and, until vacated and set aside on proper application to the court, its direction must be obeyed. (*Ballou* agt. *Parsons*, *ante*, 164.)

5. The plaintiff brought his action to recover damages and abate a nuisance. The cause was referred by consent. The referee failing to render his decision within the time allowed by statute, defendant's attorney served notice on plaintiff's attorney ending the reference, whereupon the plaintiff made a motion on affidavits showing a partial success on his part, for leave to discontinue without payment of costs:

Held, that in view of all the facts and motives of the parties in prosecuting and defending, plaintiff should be allowed to discontinue without costs of the prosecution and trial, on payment of ten dollars costs granted the defendant for opposing the motion. (*Lochlin* agt. *Casler*, *ante*, 228.)

6. The question of the costs of the administrator establishing relationship to decedent, should be reserved until the final accounting. (*Matter of Gooseberry*, *ante*, 310.)

See ATTORNEY'S LIEN.
Crotty agt. *MacKenzie*, *ante*, 54.

7. Where a judgment of foreclosure against a grantor of a mortgage assumed by his grantee has been paid by grantor — although the grantee was not notified of the foreclosure suit — the grantor is entitled to recover of his grantee the amount of the judgment paid by him, and the costs and expenses of the foreclosure should be deducted from the amount realized upon the sale of the property. (*Comstock* agt. *Drohan*, 8 *Hun*, 373.)

8. Where, in an action brought in pursuance of section 449 of the Code, to determine conflicting claims to real property, the plaintiff's complaint is dismissed, the defendant is entitled to costs, as a matter of right, and the court cannot prevent his recovering the same. (*Rugen* agt. *Collins*, 8 *Hun*, 384.)

9. Upon appeal from a judgment recovered by the plaintiff a new trial was granted, "with costs to the defendant to abide the event." Plaintiff having recovered a judgment upon the new trial, taxed his costs for both trials. *Held*, that he was entitled so to do; that the order of the general term only deprived him of the costs of the appeal. (*Howell* agt. *Van Sicklen*, 8 *Hun*, 524.)

10. The statute requiring non-residents to give security for costs in actions brought by them, does not require such security to be given by aliens residing in this state, unless such residence is shown to be merely temporary. (*Norton* agt. *Mackie*, 8 *Hun*, 520.)

Right to, of attorney in the city of New York, for the collection of personal taxes. (*See Gale* agt. *Mayor*, 8 *Hun*, 370.)

Digest.

Taxation of — dispute as to whether title to real property was involved — certificate of county judge conclusive upon the taxing officer, to show that the title to land came in question on the trial. (*See Lillis* agt. *O'Conner*, 8 *Hun*, 280.)

Payment of — imposed on attorney for insertion of irrelevant and scandalous matter. (*See McVey* agt. *Cantrell and Taddiken* agt. *Cantrell*, 8 *Hun*, 522.)

11. The lien of an attorney extends to the "agreed compensation" to be paid out of the judgment. The agreement operates as an equitable assignment of so much of the judgment. (*Brown* agt. *The Mayor*, 9 *Hun*, 587.)

12. Section 308 of the Code abrogated all rules and provisions of law preventing an attorney from agreeing with his client for the measure or mode of his compensation, and left the same to the agreement of the parties, express or implied. (*Id.*)

13. Where counsel are employed to assist in the trial of an action, they have no lien upon a judgment recovered therein for the services rendered by them. (*Id.*)

14. The compensation to be recovered by them cannot be fixed upon a summary application in the action, but must be established in the forms prescribed by law for the recovery of debts. (*Id.*)

15. Where in an action in equity each party succeeds as to part of the matters in litigation between them, costs are not allowed to either as against the other. (*Law* agt. *McDonald*, 9 *Hun*, 23.)

16. Where in an equitable action the complaint set forth two causes of action, as to one of which the plaintiff succeeded and as to the other of which he failed, *held*, that it was error to award him the costs of the entire action, including those incurred in the trial of that cause of action as to which the defendant succeeded. (*Id.*)

17. The discretion vested in the trial court to award costs in equitable actions is subject to review at the general term, when it has been exercised in manifest disregard of equity and right. (*Id.*)

18. Section 304 of the Code, awarding costs to the successful party, as a matter of right, in cases where the title to real property is brought in question, applies only to actions at law as distinguished from actions in equity. (*Id.*)

Where an action has been discontinued and the controversy submitted to arbitrators, the costs of the action may be allowed to the successful party by the arbitrators. (*See Boughton* agt. *Seaman*, 9 *Hun*, 392.)

On street openings — taxation of, how set aside and reviewed. (*See Mayor* agt. *Cornell*, 9 *Hun*, 215.)

Special proceeding — Commitment of referee for contempt for refusing to carry out judgment of foreclosure — is not. (*See People ex rel. Day* agt. *Bergen*, 9 *Hun*, 202.)

On application for distribution of surplus moneys — what can be allowed on — no extra allowance proper. (*See McDermott* agt. *Hennesy*, 9 *Hun*, 59.)

19. Plaintiff brought suit to determine the validity of a lease of its road. Defendant S. had judgment upon demurrer to the complaint, and was granted an extra allowance of $4,000. *Held*, that the subject-matter of the action was the lease, and that its value, not the value of the road or the rental value thereof, should have been taken as the basis of the extra allowance; and there being no proof that the lease was of any value, that the allowance made

was unauthorized. (*O. and L. C. R. R. Co.* agt. *V. and C. R. R. Co.*, 63 *N. Y. R.*, 176.)

20. In cases where, under section 306 of the Code, costs are in the discretion of the court, the discretion exists and may be exercised in every stage of the action, and therefore by this court upon appeal, as to costs of appeal. (*Chipman* agt. *Montgomery*, 63 *N. Y. R.*, 221.)

21. The latter clause of that section, declaring costs of appeal in certain cases to be in the discretion of the court, merely extends that discretion to cases in which, but for that provision, costs would have been recoverable by the prevailing party under sections 304 and 305. (*Id.*)

22. The provisions of section 385 of the Code, giving defendant costs where plaintiff does not accept an offer of judgment, and fails to obtain a more favorable one, applies to foreclosure suits where a personal judgment against the obligor for any deficiency is asked. (*Bathgate* agt. *Haskin*, 63 *N. Y. R.*, 261.)

23. The fact that after defendant has offered to allow judgment for all that plaintiff is entitled to demand, an application to the court is necessary in order to perfect the judgment does not take the case out of the statute. (*Id.*)

24. In such an action defendants set up, as a counter-claim, an account without giving the items; plaintiffs demanded a copy of the items. Before this was served, defendants served an offer to allow judgment against them for a specified sum, and for a foreclosure and sale. Plaintiffs obtained the ordinary judgment of foreclosure and sale, with a personal judgment for any deficiency. The amount found due was less than the offer, the counter-claim having been allowed. It was urged by plaintiff that the judgment obtained was more favorable: first, because of the personal judgment for a deficiency; second, because the counter-claim was extinguished, and until a copy of items of the account was served the counter-claim was inchoate (*Code, sec.* 158), and could not be considered as embraced in the offer. *Held*, untenable, as the offer allowed a personal judgment for the full amount, and thus covered any possible deficiency, and as the answer sufficiently appraised plaintiffs of the nature of the counter-claim. (*Id.*)

25. In determining in such case whether the offer be more favorable, defendant is entitled to have interest upon the amount offered, from the time of the offer to the date of the judgment, added. (*Id.*)

26. The judgment below originally was for more than the amount offered; it was reduced by allowance of the counter-claim on appeal to this court, and in other respects affirmed. The offer did not appear in the appeal papers. *Held*, that the omission thereof did not preclude defendants from the benefits of the offer; and that, upon the correction of the judgment below, it was competent for the court to give them their statutory rights. (*Id.*)

COUNSEL.

Employed to assist in the trial of an action, have no lien upon a judgment recovered therein, for their services rendered. (*See Brown* agt. *The Mayor*, 9 *Hun*, 587.)

The compensation to be recovered by them cannot, without the consent of the parties, be fixed upon a summary application in the action, but must be established in the forms prescribed by law for the recovery of debts. (*Id.*)

Digest.

COUNTER-CLAIM.

1. A counter-claim to a claim for freight under a charter-party, can be sustained for a loss occasioned by the excessive drainage of hogsheads of sugar, caused by the detention of the vessel after a full cargo has been obtained, when such detention arises from the illegal acts of the master. (*Elwell* agt. *Skiddy*, 8 *Hun*, 73.)

2. Also for money compulsorily paid by the agent of the charterer, to release their property seized, because of the unlawful act of the master. (*Id.*)

3. A party, except in cases commenced in a justice's court, having a demand against another, can maintain an action therefor, although at the time an action is pending against him by the same party, wherein he could have set up such demand as a counter-claim. (*Insley* agt. *Hampton*, 8 *Hun*, 230.)

COUNTY COURT.

1. Where lands used for the charitable purposes of an association are exempted by statute from taxation, and the assessors of the town in which they lie illegally and improperly assess them, the county court, on application of the party aggrieved, has power, under section 5, chapter 855, Laws of 1869, as amended by chapter 695 of the Laws of 1871, to order the taxes (when paid) to be refunded. (*Matter of N. Y. Catholic Protectory*, 8 *Hun*, 91.)

2. Where the assessors have power to act, the county court cannot interfere with the exercise of the power, but where they have no power to act, the assessment is illegal and improper, and the county court can order the tax paid on such illegal assessment to be refunded. (*Id.*)

3. Has no power, on motion, to set aside transcript of and vacate judgment of justice's court — the remedy of the defendant is by appeal. (*See Douglass* agt. *Reilly*, 8 *Hun*, 85.)

COUNTY JUDGE.

1. A county judge has power and is authorized to grant chamber orders. (*Strickland* agt. *Heuger*, *ante*, 180.)

2. A judge at chambers has no power to make an absolute, indefinite and continuing order, either to set aside or stay proceedings. (*Id.*)

3. The plaintiff had served a complaint, and a motion had been made by defendants to have it made more definite, &c., and an order allowing plaintiff to amend his complaint was entered by the Jefferson June special term; the plaintiff, availing himself of the order, served an amended complaint on September 9, 1876. The order of June special term gave defendants forty days after such amended complaint was served, to answer. October seventeenth, on notice of motion and affidavits, an order was granted by a county judge which reads, viz.: "On the foregoing affidavits and notice of motion, ordered, that the time for defendants to serve answer or demur in this action be extended twenty days *from date*, and all proceedings on the part of plaintiff be stayed accordingly."

Held, that the order of October seventeenth, granted by the county judge was authorized and valid. (*Id.*)

COURT OF OYER AND TERMINER.

1. Under the judiciary act of 1847 (*sec.* 37, *chap.* 280, *Laws of* 1847) a court of oyer and terminer cannot

be held, except in the city and county of New York, unless composed of a justice of the supreme court and at least two of the other officers mentioned in the act. (*The People* agt. *Shaw*, 63 *N. Y. R.*, 36.)

2. A court of oyer and terminer, before whom defendant in error was tried, consisted at the beginning of the trial of a justice of the supreme court, county judge, and two justices, members of the court of sessions. During the progress of the trial one of the latter absented himself for a day, during which the trial proceeded. Upon his return he took part in the subsequent proceedings. After the charge, and before the rendition of the verdict, the county judge left the court and did not return. *Held*, that the sessions justice, by his absence, disqualified himself from further sitting, and his subsequent participation in the trial was error. Also, that the verdict was received by a court not legally constituted. (*Id.*)

CREDITOR'S SUIT.

1. Before a plaintiff can commence or maintain an action in the nature of a creditor's bill, its remedy at law against the judgment debtors must first be exhausted. (*Produce Bank* agt. *Morton*, *ante*, 157.)

2. Where the plaintiff begun his action against the three defendants as copartners, service of the summons and complaint was made on two of the defendants, judgment was entered and docketed by the clerk, on default, against the two defendants served only, and an execution on this judgment was issued to the sheriff against the property of the three defendants, which was returned "no personal or real property:"

Held, that the plaintiff had exhausted its remedy at law against the judgment debtors, so as to entitle it to proceed in equity to reach joint property (*Code*, *sec.* 294).

Held, *also*, that although the judgment upon which the execution was issued was not in form entered against the joint debtors, but only against the two who were served, yet it appeared on the face of the judgment roll that it was founded upon a joint obligation, and should have been entered in in form against all the debtors, they all being parties defendant.

Held, *also*, that where there is a mistake or defect in the docket merely of form, the court has the power to amend the same. (*Id.*)

CROSS-EXAMINATION.

A question to test the degree of confidence a witness has in the accuracy of his memory, is proper on. (*See Parmelee* agt. *People*, 8 *Hun*, 623.)

CURTESY.

1. Where a wife, who has acquired title to real estate since the acts of 1848, dies intestate, her husband is entitled to an estate, as tenant by the curtesy, in the lands of which she dies seized, subject to the payment of her debts. (*Arrowsmith* agt. *Arrowsmith*, 8 *Hun*, 606.)

2. The surrogate has power to direct the sale of lands in payment of the debts of the deceased; and the husband will acquire the same interest in the surplus remaining, after payment of the said debts, as he had in the land itself. (*Id.*)

3. Although the surrogate has power under the Revised Statutes (3 *R. S.* [*6th ed.*], 116, *and chap.* 150 *of* 1850), to order the investment of such surplus, on the ground that the husband is entitled to an estate for life therein, he has no power to direct that such property be applied in payment of the debts of

the husband. He can pass upon the claims of creditors of the intestate, but not upon those of creditors of the husband. (*Id.*)

DAMAGES.

See CORPORATION (NEW YORK CITY).
McGuiness agt. *Mayor*, *ante*, 450).

1. Upon a former trial plaintiff recovered a verdict for $5,000, which was set aside by the general term, on the ground that the damages awarded were excessive. Upon the second trial a verdict was recovered of $4,000. *Held*, that this second verdict, rendered upon substantially the same facts as were presented to the first jury, must be accepted as final and conclusive. (*Peck* agt. *N. Y. Cen. and Hud. R. R. R. Co.*, 8 *Hun*, 286.)

2. In an action by the receiver of an insolvent insurance company against the directors thereof, who had reinsured certain policies to enforce the liability imposed upon them by the statute (2 *R. S.* [*5th ed.*], 526, *sec.* 54, *and* 519, *secs.* 9, 10), prohibiting the transfer of the effects of a corporation in contemplation of insolvency, with intent to give a preference to any particular creditor, *held*, that the directors of the company were personally liable to the holders of policies not covered by such reinsurance, to the extent of the losses sustained by them in consequence thereof, but that the sum that the receiver would have been obliged to pay to the holders of the reinsured policies under which losses had occurred, should be deducted from the sum paid for reinsurance. (*Casserly* agt. *Manners*, 9 *Hun*, 695.)

3. In an action for tort, for the conversion of two promissory notes, where the plaintiff and defendant were the only parties to the notes; *held*, that the recovery should be limited to what the plaintiff could have recovered, in an action brought upon the notes themselves, taking into account any just offsets or part payment. (*Stanton* agt. *Crispell*, 9 *Hun*, 502.)

4. In an action by a mother to recover damages for the seduction of her daughter, she is not entitled to recover compensation for the support and maintenance of her daughter's illegitimate child. (*Hitchman* agt. *Whitney*, 9 *Hun*, 512.)

Liability of municipal corporation for damages occasioned by awnings in street — duty of such corporation as to. (*See Hume* agt. *Mayor*, 9 *Hun*, 674.)

5. The damages for deprivation of future profits to which the plaintiff is entitled in an action for the wrongful abrogation by a municipal corporation of an executory contract for work, is the difference between the contract-price and what it would have actually cost to perform the contract. (*Devlin* agt. *Mayor, etc.*, 63 *N. Y. R.*, 8.)

6. In ascertaining the cost it is not proper to take into consideration any incidental advantages the contractor might have secured by reason of sub-contracts for parts of the work; and evidence of such contracts is inadmissible. (*Id.*)

7. A party seeking compensation for the loss of gains upon a contract, is not entitled to the benefits of, or to be indemnified against, a contract made with a third person, not in the contemplation of the parties when the original agreement was made. (*Id.*)

8. Plaintiff leased of defendant a hotel in the city of New York and certain adjoining premises, defendant covenanting to tear down the old building and to erect a new building on the adjoining premises to be used in connection

with the hotel, the new building to be completed and plaintiff put in possession by a specified time. Plaintiff was then occupying the hotel and a building upon a portion of the adjoining premises under a former lease. He removed the furniture from the rooms in said building and stored it while the new building was being erected. Defendant failed to complete said new building within the time specified. In an action to recover damages for breach of the covenant, *held*, that plaintiff was entitled to recover the rental value of the use, for hotel purposes, of the rooms in the new building during the time he was deprived of the use thereof by defendant's default, and as to such of the rooms for which plaintiff had the furniture he was entitled to the value of their use as furnished rooms. (*Hexter* agt. *Knox*, 63 *N. Y. R.*, 561.)

9. Where a landlord covenants in his lease to make certain repairs, in case of a breach of the covenant the tenant may make the repairs and charge the expense to the landlord, but he is not bound so to do, and may recover as damages for the breach the value of the use of any portion of the premises during the time it is rendered untenantable because of the failure to make the repairs. (*Id.*)

DEBTOR.

1. Under the provisions of the act providing for the discharge of imprisoned debtors, it is sufficient to prevent the discharge of a debtor if it be shown that he has been guilty of the acts which he is required to negative by the form of oath prescribed by section 5 of said act. (*Matter of Brady*, 8 *Hun*, 437.)

2. It sufficiently appears that the proceedings of the debtor have not been "just and fair" within the meaning of section 8, if it be shown that he has disposed of, or made over any part of his property with intent to injure or defraud any of his creditors, although such acts were committed before the commencement of the action on which he is imprisoned, provided they are shown to be so far connected with the action, as to be the grounds upon which the order for his imprisonment was based. (*Id.*)

3. It is not necessary that it should be shown that the petitioner was, at the time of the application for a discharge, concealing or attempting to conceal property, or had then in his possession or under his control any property or rights which he then secreted, or had secreted, in contemplation of such proceedings. (*Id.*)

DEFENSES.

1. Where a party is induced to enter into an executory contract for the purchase of lands by means of false representation on the part of the vendor, if, after discovery of the fraud, he accept a conveyance, he cannot set up the fraud as a defense in an action for the purchase-money. (*Vernol* agt. *Vernol*, 63 *N. Y. R.*, 45.)

2. Where a corporation has fully performed a contract on its part to manufacture and deliver certain articles, it is no defense to an action brought to recover the purchase-price, that the contract was not within or incidental to its chartered powers and privileges or the purposes for which it was created. (*W. A. Co.* agt. *Barlow*, 63 *N. Y. R.*, 62.)

3. The plea of *ultra vires* as a general rule will not prevail, whether interposed for or against a corporation, when it will not advance justice, but on the contrary will accomplish a legal wrong. (*Id.*)

Digest.

4. Accordingly, *held*, in an action brought under said statute by one manufacturing corporation against the trustees of another to recover the contract-price for goods sold and delivered to defendant's corporation, that the objection that plaintiff was not authorized to manufacture and sell the goods, or to enter into the contract, was not available as a defense. (*Id.*)

5. In an action brought against a sheriff for failure to return an execution, it is no defense that prior to the return day defendant received a warrant of attachment against the plaintiff, a copy of which he served upon the judgment debtor, and received a certificate acknowledging indebtedness to the plaintiff in the amount of the judgmnnt. (*Wehle* agt. *Conner*, 63 *N. Y. R.*, 258.)

6. Where a creditor has presented his claim against the estate of a deceased person, and the same has been rejected and six months have elapsed without the bringing of an action to enforce the same as required by the statute (2 *R. S.*, 89, *sec.* 368), this is a defense not only to an action against the personal representatives of the deceased, but also to any action brought to enforce the claim against heirs at law or next of kin. (*Selover* agt. *Coe*, 63 *N. Y. R.*, 438.)

7. An officer acting under process apparently valid, but actually void, may avail himself thereof for defense, but not for aggression. (*Clearwater* agt. *Brill*, 63 *N. Y. R.*, 627.)

8. Where, therefore, an officer, who, by virtue of a process valid upon its face, but void for want of jurisdiction of the court issuing it, has levied upon and taken possession of property, brings an action to recover the property against another officer, who by virtue of process against the owner, apparently valid, has taken it from plaintiff's possession, the character of such possession is a subject of inquiry and attack, and the invalidity of the process under which plaintiff acted may be shown; but defendant's process protects him, and its validity cannot be assailed. (*Id.*)

DEED.

1. In a deed of real estate a reservation or exception of certain property upon the land so situate as to be a part of the realty, with the privilege of removing the same by a certain time, reserves no title in the grantor to the property so reserved, if not removed within the specified time. (*Lucusterine Fertilizer Co.* agt. *Stilwell*, *ante*, 152.)

2. In 1865 Regal M. Torrey, being the owner of a certain tract of land in Seneca county, conveyed the same to one Henry C. Spaulding, by deed which contained the following clause: "Excepting the beds or deposit of marl lying on both sides of the new cut for the Canandaigua river which passes through said land, and it is an express stipulation and agreement between the parties hereto, that the said marl may remain on said land for a period of ten years from the date of this indenture, and that the party of the first part may, at any time within said ten years, remove a part or the whole of said marl." In 1867 Torrey, by bill of sale, conveyed the marl to Henry A. Barnum, under which bill of sale the plaintiffs claim. The defendants claim under the deed to Spaulding. Torrey died in 1870:

Held, first, that the exception in the Spaulding deed existed only in favor of Torrey, the grantor, and terminated with his life, if it did not expire with the ten years. (*Id.*)

3. Second, that the exception was only of so much marl as Torrey might remove in ten years, and not of the entire quantity, if unremoved at expiration of that period. All that was unremoved when the ten years had expired passed by the deed. (*Id.*)

DEMURRER.

1. In an action to foreclose a mechanic's lien, although other persons than the one against whom the claim was filed as owner of the premises are made parties defendant, on the ground that conveyances by and to them, of the premises, were fraudulently made to defeat plaintiff's claim, and the complaint asks to have such conveyances declared void, yet there is only one cause of action set forth in the complaint and the same is not demurable. (*Tisdale* agt. *Moore*, 8 *Hun*, 19.)

2. Even if the prayer for judgment, upon the facts alleged, be for too much, it is not ground for demurrer. (*Id.*)

When the facts alleged justify any relief — though not the relief asked for — will not be sustained. (*See Mackey* agt. *Auer*, 8 *Hun*, 180.)

To a portion of a pleading — judgment cannot be entered upon decision of, until the issues of fact raised in the case have been decided. (*See Bucking* agt. *Hauselt*, 9 *Hun*, 633.)

An objection to the sufficiency of an answer, on the ground that the proper relief is not asked for, must be presented by demurrer, and is waived by going to trial on an issue of fact. (*See Dawley* agt. *Brown*, 9 *Hun*, 461.)

DEPOSITION.

1. Where, upon the taking of the deposition of a witness *de bene esse*, the opposing party is present in person, or is represented by counsel, and the witness refuses to answer proper and material questions, the objection must be availed of upon the examination, or afterwards by motion before the trial; the party cannot wait until the trial and then object to the reading of the deposition, or move to suppress it. (*Sturm* agt. *A. M. Ins. Co.*, 63 *N. Y. R.*, 77.)

DISCONTINUANCE.

1. An order of discontinuance, with a provision therein that plaintiff pay defendant's costs when taxed, is valid and effectual from the time it is served, and plaintiff is not in default until defendant has procured his costs to be adjusted and demanded. When this is done the question as to the remedy of the party is one of practice, to be determined by the court below. (*People* agt. *Tweed*, 63 *N. Y. R.*, 202.)

DISCOVERY.

1. Where the application was made by defendant for a discovery and inspection of all books kept by plaintiff as a physician and surgeon from the time of the accident and for two years prior thereto, in order to ascertain what the value of and receipts from plaintiff's practice were and are, so that they may be prepared on the trial of that issue, the application being made upon affidavit of defendant's belief that plaintiff has kept and still keeps books in which are entries tending to show the amount of his receipts and charges, but does not describe or indicate any particular book or books of which discovery should be made:

Held, to be an inquisitorial examination of all the books, papers and documents that is sought in the hope that they contain evi-

dence of the falsity of plaintiff's averments in his complaint, as to the extent and emoluments of his practice, and is within the rules laid down to prevent a mere fishing examination. (*Mott* agt. *The Consumers' Ice Company*, *ante*, 148.)

2. Neither party will be allowed a discovery to enable him to rebut an anticipated case of the other. (*Id.*)

3. Where the party against whom a discovery is sought is a physician and surgeon, and resists an inspection of his books upon the ground that they contain, as part of his records, information derived from his patients, which is of a privileged character, the application will be denied. (*Id.*)

4. The books of a physician and surgeon and the entries contained therein, when made in a private and professional manner, containing information acquired by him in attending patients in a professional character, and which information was necessary to enable him to prescribe for such patients as a physician and to act as a surgeon, *are privileged* (2 *R. S.*, 671, *sec.* 112 [*6th ed.*]), and as such are exempt from an inspection or examination by an adverse party. (*Id.*, 244.)

5. A *party* to an action may, at the instance of the *adverse party*, be compelled, by *subpœna duces tecum*, not only to appear at the trial and submit to a personal examination, but to produce books and papers in his possession precisely as any other witness may be so compelled. (*Id.*)

6. *It seems*, that as the defendant in this case had his remedy by *subpœna duces tecum*, he was not entitled to ask the equitable interposition of the court for a discovery and inspection (*Affirming S. C.*, *ante*, *page* 148). (*Id.*)

7. Courts of equity in compelling a discovery of books, papers and documents, proceed on the principle that it is against conscience that a party to a litigation having knowledge or the means by which knowledge could be obtained, of facts material to the litigation, should obtain an advantage to himself to the sacrifice of the development of truth, and consequent working of injustice by withholding and concealing such knowledge and means:

Held, that this principle clearly covers and authorizes the compulsory discovery, in a proper case, of *things or substances* other than books, papers, &c. (*Walsh* agt. *Sayre*, *ante*, 334.)

8. Where, in an action for *malpractice* against a surgeon to recover damages for an alleged unskillful operation performed by him on the body of the plaintiff, a child of about seven years of age, he, upon petition and affidavit, asked that the plaintiff be required to appear and submit to a personal inspection of the affected part by the defendant, and such other skillful and competent surgeons as he might name, under the direction of a referee appointed by the court for that purpose:

Held, that the court had power on such application to compel a discovery of the character of the one sought for, and that this was a proper case in which to exercise it, and accordingly ordered and directed an examination of the alleged injured part by expert surgeons appointed by the court for that purpose. (*Id.*)

DISTRICT COURT (NEW YORK CITY).

1. By the district court act, a justice is required to render his judgment, if jury trial is not demanded, within eight days from the time the same is submitted to him for that purpose, except where

the defendant is under arrest; in such case he must render his judgment immediately after the close of the trial. (*The Ready Roofing Company of New York* agt. *Chamberlin*, *ante*, 123.)

2. If the last day falls on *Sunday* the judgment must be rendered on the day preceding, *i. e.*, the seventh day, or *Saturday*. (*Id.*)

ENTRIES.

1. Entries and memoranda made in the usual course of business by notaries, clerks and other persons may be received in evidence after the death of the person making the same. In an action by a bank upon a promissory note, the discount book used by it at the time of the alleged discount was produced, and it was proved that the entries therein relating to the discount of the note were in the handwriting of the discount clerk, whose business it was to make such entries, and that he was then dead. *Held*, that the entries should be received in evidence. (*Ocean National Bank* agt. *Carll*, 9 *Hun*, 289.)

EQUITABLE ACTIONS.

1. The defendant was a depositor in the People's Savings Bank. On November 3, 1875, he purchased of said bank (through its president) a certain bond and mortgage held and owned by the bank, paying for said bond and mortgage $14,389.78 cash, and being debited on the books of said bank the amount of his balance on deposit, $10,821.18. At the time of the purchase and transfer, the bank was insolvent (though not known so to be by the defendant). (*French* agt. *O'Brien*, *ante*, 394.)

2. In an action by the plaintiff as receiver of the bank for an accounting for the bond and mortgage and the value and proceeds thereof, and for an injunction restraining the defendant from assigning or creating any lien upon the same, and asking for the appointment of a receiver of the bond and mortgage:

Held, *first*, that the suit is of an equitable character, and such as would in former times have been cognizable by the court of chancery.

Second, that the action being one of an equitable character, the principle that one who comes into a court of equity must come prepared to do equity, and to refund as much as he has received upon a transaction which is voidable and void, applies.

Third, the claim that the plaintiff in such case should do equity, by putting the defendant in the position in which he stood before the transaction was consummated, is not a *set-off* or *counter-claim*, and therefore need not be pleaded.

Held, also, that the defendant should assign the bond and mortgage to the plaintiff, on receiving from him the sum of $14,389.78, with interest, and being reinstated as a creditor upon the books of the bank in the sum of $10,821.18. (*Id.*)

ESTOPPEL.

1. Although it is the duty of the sheriff to collect the whole bid at a judicial sale, yet where he neglected to do so, at the instigation of the defendant, the latter cannot afterward insist that he erred in so doing. (*Dickson* agt. *Fraser*, 9 *Hun*, 199.)

A judgment in favor of a corporation operates as, in action against its trustees, because of failure to file annual report. (*See Tyng* agt. *Clarke*, 9 *Hun*, 269.)

Insurance agent — notice to, that property was unoccupied and re-

quest that written consent be given as required by policy — answer "we waive all that" — estops company from taking advantage of fact that consent was not in writing. (*See Adams* agt. *Greenwich Ins. Co.*, 9 *Hun*, 45.)

A corporation receiving the benefits of contracts made by its officers, although without authority, is estopped from denying the authority of its officers to enter into such contract and its liability thereunder. (*See Alexander* agt. *Brown*, 9 *Hun*, 641.)

EVIDENCE.

1. Where it becomes necessary for the court to pass upon the weight of conflicting evidence, it will consider letters written by a party, and acts performed by him contradictory of his oath, as rendering such oath of no consideration. (*Lynch* agt. *Pyne*, *ante*, 435.)

2. The provision of section 399 of the Code, prohibiting a party, in certain cases, from testifying to a personal transaction or communication between him and a deceased person, does not preclude a party from testifying to statements made by a deceased person to a third party in the witness' presence, and this, too, even although the witness should participate in the conversation. (*Patterson* agt. *Copeland*, *ante*, 460.)

3. In equity actions the court will look to the entire case, and see whether substantial justice has been done, and when that appears it will affirm the judgment, notwithstanding the admission of testimony which, in ordinary actions at law, might have necessitated a new trial. (*Id.*)

4. Evidence that concubinage of the parties has been changed into matrimony may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of actual marriage by mutual consent. (*Foster* agt. *Hawley*, 8 *Hun*, 68.)

5. Where the accused persons are a majority of the trustees of a corporation, it is sufficient evidence that the corporation will not prosecute an action against them, and that an application to the trustees to direct a suit to be brought against themselves, would be useless. (*Young* agt. *Drake*, 8 *Hun*, 61.)

6. Upon the trial of an indictment for uttering a forged promissory note, evidence tending to show that the note had been paid is immaterial, and is properly excluded. (*Brown* agt. *People*, 8 *Hun*, 562.)

7. A question to test the degree of confidence a witness has in the accuracy of his memory is proper. (*Parmelee* agt. *People*, 8 *Hun*, 623.)

8. The mere fact of a prisoner's prior arrest has no tendency to impeach his character in any particular. (*Brown* agt. *People*, 8 *Hun*, 562.)

Party to transaction — cannot testify as to intention with which an act was done — as against legal representatives of other party (*Code*, *sec.* 399). (*See Tooley* agt. *Bacon*, 8 *Hun*, 176.)

Judgment roll against grantor in foreclosure of mortgage assumed by grantee — evidence against grantee, although not notified of action. (*See Comstock* agt. *Drohan*, 8 *Hun*, 373.)

9. In an action of ejectment, a stipulation was made by the plaintiff and defendant by which a certain statement was agreed to be "a statement of the evidence that the witness Canfield (the plaintiff) would give on the trial, and that

the same may be read in evidence on the trial of this action by either party, with the same force and effect as if the said plaintiff and witness were personally present and examined as a witness therein." Subsequently Canfield conveyed his interest in the premises to the present plaintiffs, and, upon his death, shortly after, they were substituted in his place. Upon the trial, the defendant read the said statement, and then offered himself as a witness to testify to personal transactions with the deceased:

Held, that the evidence was properly excluded; that the parties did not intend by the stipulation to waive the right to object to the defendant's testimony as inadmissible, under section 399 of the Code, and that the exception therein, allowing a party to testify as to any communication as to which the testimony of the deceased party has been given in evidence, only applied to cases in which such testimony is given by the adverse party, and not by the one who offers himself as a witness to testify to such transaction. (*Miller* agt. *Adkins*, 9 *Hun*, 9.)

10. Where the dying declarations of a person deceased are offered in evidence upon the trial of an action, it is the duty of the court to decide whether or not, upon the facts proved, such declarations are admissible, and its decision upon this question is a matter of law and subject to review upon appeal. (*Maine* agt. *People*, 9 *Hun*, 113.)

11. To entitle such statements to be received in evidence, the person making them must have lost all hope of recovery, and have been under the apprehension of near approaching death. (*Id.*)

12. It is no objection to such testimony that it was given in answer to leading questions, or obtained upon pressing and earnest solicitation. (*Id.*)

13. The deceased died from the effect of an operation, alleged to have been performed by the plaintiff in order to produce a miscarriage. In her dying declaration, she stated "Dr. Maine (the plaintiff in error) operated on me." *Held*, that this was not the expression of an opinion, but the statement of a fact peculiarly within her knowledge. (*Id.*)

14. The counsel for the defense offered to show by the physician who attended the deceased when she was delivered, which occurred two or three days prior to her death, that she had then stated that her husband had been trying to deliver her and had failed, in order to show the effect this might have had. *Held*, that the evidence was inadmissible, because (1) it was no part of the *res gestæ*, but a narrative of a past transaction; (2) it was hearsay; (3) her declarations not *in extremis* were not admissible to contradict statements then made by her. (*Id.*)

15. The plaintiff in error was examined as a witness in his own behalf. *Held*, that it was proper to show on his cross-examination that he had committed other offenses of the kind for which he was then tried. (*Id.*)

16. Upon the trial, it was offered to show what the deceased had said after she had left the private room in which the operation was performed. *Held*, that this was not a part of the *res gestæ*, but merely a narrative of a past transaction, and was therefore inadmissible. (*Id.*)

17. Declarations made by her, tending to show that the plaintiff in error was innocent and she alone responsible, were offered in evidence under the rule that declarations against the interest of the party making them are admissible against him. *Held*, that this rule did not apply to such cases; that

the interest with which the declarations are at variance must be of a pecuniary nature. (*Id.*)

18. The credit to be given to the testimony of an accomplice is wholly a question for the jury, though judges, in their discretion, may advise the jury not to convict upon the uncorroborated testimony of an accomplice. (*Id.*)

19. Where a conviction is void, on account of the unconstitutionality of the court in which it is obtained, the certificate of such conviction is not evidedce of the guilt of the person convicted. (*People ex rel. Shea* agt. *Board of Police*, 9 *Hun*, 222.)

20. Where property is claimed to be exempt from execution, the burden of proof rests upon the party claiming such exemption. (*Brown* agt. *Davis*, 9 *Hun*, 43.)

21. Where it appears from the referee's minutes that certain evidence was objected to by the defendant, the terms used being "objected to by defendant," *held*, that the objection was insufficient to raise the point that it was inadmissible under section 399 of the Code. (*Somerville* agt. *Crook*, 9 *Hun*, 664.)

22. In an action to recover damages for an injury to plaintiff's horse, received while passing over a crossing upon defendant's track, the plaintiff was allowed, against the defendant's exception and objection, to show that shortly after the accident the defendant took up the planks at the crossing and replaced them by new ones. *Held*, that this was error. (*Payne* agt. *Troy and Boston R. R. Co.*, 9 *Hun*, 526.)

23. In an action by the indorsee of a promissory note the title of the plaintiff was not put in issue, but the defendant relied upon the statute of limitations. Upon the trial one of the makers was allowed to testify that within six years his co-maker, since deceased, had paid to him, acting as the agent of his wife, the then holder of the note, $100 to be applied upon the said note; and, also, that at the time of the transfer of the note to the plaintiff he had stated to him, the plaintiff, the fact of this payment.

Held, (1) that his testimony as to what he had stated to the plaintiff at the time of the sale of the note was inadmissible; (2) that it was not admissible as a part of the *res gestæ*, as it did not relate to or bear upon any issue raised in the case. (*Howard* agt. *Upton*, 9 *Hun*, 434.)

Proof of payments on judgment, offered to avoid statute of limitations — declaration of party attempting to prove them, to the effect that there was no consideration for the judgment — that it was confessed to cover up judgment debtors' property — admissible to show improbability of payments having been made thereon. (*See Rumsey* agt. *Cook*, 9 *Hun*, 129.)

Of declarations of conspirators — intimate relations between witnesses and conspirators — threatening letters — acts in apparent execution of — admissible when — evidence as to character, admissible when prisoner makes himself a witness, as tending to show that he is unworthy of credit. (*See Adams* agt. *People*, 9 *Hun*, 89.)

As to ownership of lots burned over by negligence of railroad company — witness may state who is in possession of real estate — after stating the facts, may give conclusions as to injury done property. (*See Miller* agt. *Long Island R. R. Co.*, 9 *Hun*, 194.)

When the real agreement may be shown, though at variance with the memorandum of sale. (*See Errico* agt. *Brand*, 9 *Hun*, 654.)

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24. *It seems*, that upon the trial of an indictment for murder, declarations of the deceased, made when *in extremis*, which are not statements of fact which a living witness would have been permitted to testify to, but are merely expressions of belief and suspicions, are not competent evidence. (*People* agt. *Shaw*, 63 *N. Y. R.*, 36.)

25. In an action by the holder of a railroad passenger ticket, by its terms limiting the time within which it can be used to recover damages for being ejected from the train because of refusal to pay fare after expiration of time, evidence was offered on his behalf and rejected, that he had purchased at other occasions similar tickets and had used them after the expiration of the specified time. *Held*, no error; that in the absence of evidence of a valid arrangement with a proper officer of the company, the evidence offered would show no authority so to use the ticket. (*Hill* agt. *S. B. and N. Y. R. R. Co.*, 63 *N. Y. R.*, 101.)

26. In an action against several persons upon an account arising from stock transactions, claimed by plaintiff to have been joint transactions on the part of defendants, but claimed by one of the defendants to have been several, *held*, that evidence that said defendant had a private account running at the same time was competent as a circumstance tending to show that the other account was joint and not several. (*Quincy* agt. *White*, 63 *N. Y. R.*, 876.)

27. Where evidence is competent for any purpose it is not error to receive it, although a wrong reason is alleged. (*Id.*)

28. Where, therefore, after evidence had been given in said action tending to prove an agreement on the part of plaintiff's partner, that the firm would assume a portion of the stock, plaintiff was permitted to testify, under objection, that he did not assent to, and knew nothing of the alleged transaction, which evidence was offered for the avowed purpose of showing that from the nature of the business of plaintiff's firm his partner could not bind him to such an agreement, *held*, that although the evidence was incompetent for the purpose offered, yet as it was competent to contradict defendant's evidence, its reception was not error. (*Id.*)

29. In an action against a railroad corporation to recover damages for injuries resulting from a collision at a street crossing, evidence that a flagman had always been kept at the crossing, and that he was absent at the time of the accident, is competent as bearing upon the question whether, under all the circumstances, defendant ran and managed its train with the requisite care and prudence (EARL, *J.*; RAPALLO, *J.*, *concurring*). (*McGrath* agt. *N. Y. C. and H. R. R. R. Co.*, 63 *N. Y. R.*, 522.)

30. The competency of the evidence is not affected by the fact that defendant was not the owner of the road over which it was running its train. (*Id.*)

31. So also in such case a municipal ordinance properly passed and promulgated requiring a flagman to be stationed at all street crossings is competent as evidence. (*Id.*)

32. On an issue as to whether A. was employed by B., it is competent for B. to show conduct of A. during the alleged term of employment inconsistent with the theory of such employment. (*Miller* agt. *Irish*, 63 *N. Y. R.*, 652.)

33. Such evidence is also admissible upon an issue as to the value of the alleged services. (*Id.*)

34. Of circumstances under which bond of indemnity was given, when proper, and evidence varying terms of bond, when improper. (*Id.*)

EXAMINATION OF PARTIES.

1. It is well settled that a party examined as a witness, either at or before the trial, may be required, upon a *subpœna duces tecum*, to produce his *books* or *papers* relating to or containing evidence pertinent to the issues in the action. (*Smith* agt. *Macdonald*, *ante*, 117.)

2. There is no discrepancy between the provisions of sections 390, 391 of the Code, which authorize compulsory examination of a party as a witness, at the instance of the adverse party before trial, and the privilege accorded by section 388, under which, in certain cases, an inspection and copy of books and papers containing evidence relating to the suit may be obtained through the order of the court, or a justice thereof, in their discretion, and it would be unreasonable and unjust to withhold the process of *subpœna duces tecum* merely because a *discovery* is also allowed under certain special circumstances. (*Id.*)

3. The examination of parties who are made defendants in expectation or hope that upon their examination some cause of action may thereby be discovered against them or against any co-defendant, will not be allowed where no cause of action is shown by *affidavits* to exist against them in favor of plaintiffs. (*Tilton* agt. *United States Life Ins. Co.*, *ante*, 179.)

4. Affidavits on mere information and belief, not stating any of the evidence upon which such belief is founded, are wholly insufficient for such purpose. (*Id.*)

5. The distinction between an affidavit and complaint pointed out. (*Id.*)

6. The examination provided for by section 391 of the Code is limited to cases where a discovery would have been previously ordered in equity in aid of the prosecution or defense of the action. (*Shepmoes* agt. *Bowsson*, *ante*, 401.)

7. The affidavit upon which the application for the examination is based must state: 1st. The nature of the action and the plaintiff's demand. 2d. If by the defendant, the nature of his defense. 3d. How any fact sought to be discovered and within plaintiff's knowledge can be applicable or material. (*Id.*)

8. Where these statements are not made, the application lacks every essential element of such a proceeding as justified a bill of discovery before the Code, or any license of examination which *it* affords, and is an inquisitorial and fishing proceeding, condemned by all the authorities applicable to the subject. (*Id.*)

9. A party cannot be examined at the instance of his adversary, except on matters which that adversary is bound to prove as part of his case. (*Id.*)

10. Where, as in this case, all the matters which the defendant seeks to elicit, by way of discovery or proof, from her adversary, are such as he is in the first instance bound to maintain and prove as essential to his case, before she is in any way called upon to enter upon her defense, the application should be denied. (*Id.*)

11. The examination should only be allowed when it appears that it is sought for in good faith, for purposes of discovery of matters resting peculiarly in the knowledge of the adverse party, and the tes-

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timony sought is material to the case of the party seeking the examination, but *never* for the mere purpose of eliciting the grounds or sources of the adverse claims or the evidence by which it is to be established. (*Id.*)

12. Where a party, required to attend before a judge or referee to be examined as a witness, in pursuance of section 391 of the Code, has appeared in the action by an attorney, notice of the examination should be served upon the attorney as well as upon the party. (*Plummer* agt. *Belden*, 8 *Hun*, 455.)

EXCEPTIONS.

When may be ordered to be heard in the first instance at the general term. (*See Brown* agt. *Conger*, 8 *Hun*, 625.)

1. Where a party objecting to the confirmation of a referee's report, on a reference to ascertain and report the extent of an attorney's lien upon a judgment, limits his exceptions to the finding of facts and conclusions of law of the referee, no question is raised by them as to the admission of improper or illegal evidence, or as to any thing that occurred during the progress of the trial. If the party aggrieved desires to review these questions, he should specify, as part of his exceptions to the report, that it was founded on illegal evidence, and that the referee had improperly overruled his objections to the reception thereof. (*Brown* agt. *The Mayor*, 9 *Hun*, 587.)

To nonsuit or direction to jury to bring in verdict, sufficient — not necessary to ask to go to jury. (*See Bowe* agt. *Gano*, 9 *Hun*, 6.)

2. In respect to exceptions to evidence, there is no distinction between legal and equitable actions. (*Norton* agt. *Mallory*, 63 *N. Y. R.*, 434.)

3. A denial of a motion for a new trial, made on the judge's minutes, is not the subject of an exception, and such an exception presents no question of fact for review upon appeal from the judgment. (*Matthews* agt. *Meyberg*, 63 *N. Y. R.*, 656.)

4. The office of an exception is to point out errors committed by the court during the progress of the trial. (*Id.*)

5. To bring up the case for review upon the facts there must be an appeal from the order denying the motion for a new trial. (*Id.*)

EXECUTION.

1. A defendant in an equitable suit is not liable to imprisonment or final execution unless it appears by the complaint that the cause of action is one which falls within section 179 of the Code, or where the court has upon an affidavit stating extrinsic facts, granted an order of arrest. (*Pam* agt. *Vilmar*, *ante*, 238.)

2. The uniting of a cause of action for which a defendant could be arrested, with one for which he could not, entitles him to have the execution against his person vacated and set aside. The union of the causes of action amounts to a waiver of the right to an arrest, and also to a waiver of a right to an execution against the person. (*Id.*)

3. On a motion to vacate an execution against the person, the findings of the justice at special term cannot be considered for the purpose of upholding the execution. If the complaint does not show a right to arrest, or if it shows that such right has been waived by an improper blending of two causes of action, in the absence of an order of arrest, final execution

against the person cannot be resorted to. (*Id.*)

4. After the filing of a transcript and docketing of a judgment obtained in the marine court of the city of New York, in the office of the clerk of the city and county of New York, the judgment can only be enforced as a judgment of the court of common pleas. (*Oberwarth* agt. *McLean, ante*, 491.)

5. The judgment creditor may, before filing a transcript, issue an execution out of the marine court to a marshal, and after such execution is returned wholly or partly unsatisfied, or after sale thereunder, he may file his transcript and issue execution to the sheriff. (*Id.*)

6. But he cannot issue execution to a marshal after the transcript is filed, because the judgment is then enforceable only in the same manner as judgments of the common pleas. (*Id.*)

7. The right to an execution out of the marine court on a judgment obtained in that court is immediate, but the judgment creditor must make his election, and if he file a transcript of his judgment with the county clerk, his election is made; the law declares that thereupon his judgment shall be enforced in the same manner as judgments of the court of common pleas (*act of* 1872, *chap.* 629, *sec.* 8). This mode of enforcement is exclusive. (*Id.*)

8. The term, "injury to person," as used in section 179 of the Code, cannot be extended by judicial construction beyond injuries to the person of the *plaintiff*. An action for such an injury dies with the plaintiff. (*Ryall* agt. *Kennedy, ante*, 517.)

9. An action brought by an administrator against the master of a vessel for negligently causing the death of his intestate, is not such an action as will authorize the arrest of the defendant. (*Id.*)

10. It is not an action for an injury to the person of the *plaintiff*, but a statutory action founded upon the death of plaintiff's intestate. The statutes under which such actions are now maintainable provide for the recovery of pecuniary damages not exceeding $5,000, but give no remedy against the person of the defendant. They are in derogation of the common law, and hence their provisions cannot be extended and deemed to confer, by implication, a right of arrest, as long as their language is not fairly susceptible of such an interpretation. (*Id.*)

11. It is no excuse to sheriff for not proceeding on an execution in his hands, after levy, that proceedings in bankruptcy were afterwards instituted against the judgment debtor, pending which the sheriff was enjoined from further proceedings on the execution. (*Ansonia Brass and Copper Co.* agt. *Babbitt*, 8 *Hun*, 157.)

12. In the latter part of February, 1874, the defendant, a deputy sheriff, seized a wagon belonging to the plaintiff under an execution issued against him, and advertised the same to be sold on March tenth, but subsequently, at the request of the plaintiff, the sale was postponed. At the time of the levy the plaintiff owned three or four other wagons, all of which were subsequently, and prior to April fourteenth, disposed of by him. On the latter day the defendant took possession of the wagon and sold it, against the objections of the plaintiff, who claimed that it was exempt under chapter 134 of 1859. In an action to recover for its conversion, *held*, that the plaintiff was bound to make his election within a reasonable time, and to notify the officer that he claimed the property as exempt, and that the question

whether or not he had made his election within a reasonable time should, under the circumstances of this case, have been submitted to the jury. (*Brooks* agt. *Hathaway*, 8 *Hun*, 290.)

Failure of sheriff to return — action upon sheriff's bond — when permitted — 3 R. S., section 3, title 5, chapter 8 — construction of — permissive—not mandatory. (*See People* agt. *Conner*, 8 *Hun*, 538.)

18. In an action brought against a sheriff for failure to return an execution, it is no defense that prior to the return day defendant received a warrant of attachment against the plaintiff, a copy of which he served upon the judgment debtor, and received a certificate acknowledging indebtedness to the plaintiff in the amount of the judgment. (*Wehle* agt. *Conner*, 63 *N. Y. R.*, 258.)

14. The attachment does not prevent the sheriff from collecting the execution, nor does the service of the attachment dispense with duty imposed upon him of returning the execution. (*Id.*)

EXECUTORS.

1. The defendants, executors, in pursuance of 2 Revised Statutes, 88, section 34, published a notice to creditors to present their claims, the words being in the usual form except that the word "requested" was used instead of "required." *Held*, that there was no substantial difference between the words "request" and "require" as the latter was used in the statute, and that the notice was sufficient. (*Prentice* agt. *Whitney*, 8 *Hun*, 300.)

2. Upon the application of a legatee to secure the removal of an executor, on the ground that he had improperly invested moneys of the estate, and had removed from the state, the surrogate ordered that security be filed within five days, or that he be removed. A bond was accordingly filed, pursuant to 2 Revised Statutes, 72, section 20, conditioned, among other things, that "he shall obey all orders of the surrogate touching the administration of the estate committed to him." *Held*, that the sureties to this bond were liable, not only for all sums received by the executor after the giving of the bond, but also for all moneys misappropriated by him before that time. (*Schofield* agt. *Hustis*, 9 *Hun*, 157.)

EXEMPT PROPERTY.

1. Where property is claimed to be exempt from execution, the burden of proof rests upon the party claiming the benefit of such exemption. (*Brown* agt. *Davis*, 9 *Hun*, 43.)

2. The plaintiffs, who were householders, owned a wagon worth $100, which was the only lumber wagon they had, and which was used in and necessary for the carrying on of the business in which they were engaged as copartners. *Held*, that these facts did not show that the wagon was exempt from execution. (*Id.*)

3. A wagon is only exempt from execution as constituting part of a "team," which consists of one horse or two horses, with their harness and the vehicle to which they are customarily attached for use. (*Id.*)

EXTRA ALLOWANCE.

1. It is sufficient, under section 309 of the Code, to entitle a defendant to an extra allowance (although he had not answered when the cause was discontinued), that he had appeared and defended by interposing a demurrer. (*Moulton* agt. *Beecher*, *ante*, 230.)

2. Where the plaintiff succeeded upon the demurrer, the defendant having done nothing more in the cause than to appear and obtain extensions of the time to answer, a moderate fee only should be granted, and this because the plaintiff, by commencing his action, rendered the employment of counsel necessary. (*Id.*)

3. A motion for an extra allowance must be made before the final adjustment of costs (*Rule* 56). (*Id.*)

4. Where in an action upon a money demand the plaintiff claims to recover $7,000, and upon the trial obtains a verdict for six cents, an extra allowance cannot be granted to the defendant, under section 309 of the Code, based upon the amount claimed by the plaintiff. (*Murray* agt. *Robinson*, 9 *Hun*, 187.)

FACT.

1. When the uncontradicted evidence establishes the existence of a fact, essential to the plaintiff's right to recover, it will be presumed, in support of a judgment in his favor, that such fact was found by the referee, though not so stated in his report. (*Bancker* agt. *Mayor*, 8 *Hun*, 409.)

2. In an action to recover an alleged unpaid balance of the purchase-price of certain premises, the court found, in substance, that plaintiff having entered into a contract with R. to purchase the premises for $5,250, represented to defendant that it was to cost him $6,000, and that defendant could have it for that price; that defendant, believing such representations, verbally agreed to purchase at that price; that defendant after discovering the facts, with the consent of plaintiff, received a deed from R., paying to her $5,250. *Held*, that it was to be presumed from the facts found that the deed was delivered in accordance with the parol agreement; that it was not necessary to prove a promise by defendant at the time of the delivery to pay the balance; and that the false representations were not a defense. (*Vernol* agt. *Vernol*, 63 *N. Y. R.*, 45.)

FALSE IMPRISONMENT.

1. Where a person had been committed for a contempt, and released on habeas corpus, and was afterward brought before the judge, retried and resentenced for the same contempt, and additional and more severe penalties imposed upon him, *held*, error. (*Snyder* agt. *Van Ingen*, 9 *Hun*, 569.)

FALSE REPRESENTATIONS.

1. Defendants, in order to induce the plaintiff to sell them goods, represented that they were the owners of a hotel, of which the estimated cost was $800,000 and upon which there was a trust mortgage of $600,000, for which amount bonds had been issued, $525,000 of which had been sold at par. It appeared upon the trial of this action, brought to recover damages sustained from defendants' false representations, that the amount stated to have been sold at par included $20,000 held by banks as collateral security, $150,000 turned out in payment for the real estate, and certain bonds subscribed for by parties who had refused to take them, all which facts were known to defendants. *Held*, that the evidence showed the statement to be false and fraudulent. (*Westcott* agt. *Ainsworth*, 9 *Hun*, 53.)

2. Upon the inquiry being made of one of the defendants as to a report that all his property was covered up in his wife's name, he replied that the only property she

had in the world was the little house in which she lived. It appeared upon the trial that he was, at that time, indebted to his wife to the amount of $65,000, of which $25,000 was for the price of real estate sold by her to him, and for which he had agreed to give her a mortgage. *Held*, that the statement was false and fraudulent. (*Id.*)

3. One of the defendants stated that he had put $20,000 into the business. It appeared that he had in fact put in but $16,000 in cash, and a note for $4,000, which had never been paid, and which he had subsequently taken back. *Held*, that the statement was false and fraudulent. (*Id.*)

4. In an action to recover damages sustained by one who has been induced to sell goods to the defendant by false representations made by him, it must be shown that the defendant believed, or had reason to believe, that such statements were false at the time they were made; but proof of knowledge on his part of facts showing the statements to have been false cannot be overcome by his testifying that he believed the statements to be true. (*Id.*)

FICTITIOUS NAME.

1. A plaintiff is not allowed to use a fictitious name for the defendant at his discretion, but only when he is ignorant of the true name. (*Gardner* agt. *Kraft*, *ante*, 499.)

2. If the name of the defendant be unknown he may be sued by a fictitious name; but if a fictitious name is adopted in the summons or in the complaint (if one accompany the summons), there must be a distinct allegation to the effect that the name so used is by reason of ignorance of the defendant's true name. (*Id.*)

3. A person sued as Mr. Kraft, in the district court, did not appear, and judgment was recovered by default, which was assumed to have been made a judgment of the common pleas, by the filing of a transcript with the county clerk. On application for an order in supplementary proceedings on the judgment:

Held, that the judgment was void, and not one upon which any final process could lawfully be issued against the property or person of the person so served. (*Id.*)

FIDUCIARY CAPACITY.

1. Where a *specific sum of money* is intrusted to a party upon the credit of his personal integrity to be invested in a *particular way*, it cannot be charged to his mercantile credit, which is based upon his financial status only, and be thereby reduced or changed to a simple debt. (*Obregon* agt. *De Mier*, *ante*, 356.)

2. Such money is held by him in a *fiduciary capacity* and must be used as directed by the owner of the fund; and the relation is not changed, though the previous directions are rescinded and a new direction is conveyed in the form of a draft upon him for the whole sum. (*Id.*)

3. Although, by the acceptance of the draft the defendant incurred a liability to the payees and holders of the draft, it is sufficient upon the trial to surrender any such securities. (*Id.*)

FORECLOSURE.

1. Where, after a referee has been appointed to sell real estate, in pursuance of a judgment of foreclosure, and a notice of sale has been duly published, the defend-

ant serves an undertaking to stay proceedings upon appeal, in pursuance of section 341 of the Code, the plaintiff is not required to abandon the proceedings instituted by him, but may adjourn the sale until it can be determined whether or not the sureties will justify. (*Ward* agt. *James*, 8 *Hun*, 526.)

2. No fees can be allowed to an auctioneer for services rendered upon the adjournment of a sale by a referee. (*Id.*)

3. A referee is only entitled to receive the same fees for selling real estate as by law is allowed to a sheriff. (*Id.*)

4. The complaint and *lis pendens* in this action, brought to foreclose a mortgage, were filed September fourth, and one defendant served September sixth. On the eighth the mortgagor filed a petition to be, and on the twenty-third he was, declared a bankrupt. On the eleventh the mortgagor was served with a copy of the complaint and notice of motion for appointment of a receiver to collect the rents and profits, *pendente lite*. On October first a receiver was appointed. The premises having been sold under a decree of foreclosure on the thirteenth of December, and a deficiency having arisen thereon, the plaintiff applied on the twenty-third of March to have the accounts of the receiver passed. Upon the hearing the court directed the funds in the hands of the receiver, being the amount of the rents collected by him prior to the sale, to be paid over to the assignee in bankruptcy. *Held*, that this was error; that the assignee took only such interest in the premises as the bankrupt had, and that such interest was subject to the equity existing in favor of the plaintiff to have the receiver appointed. (*Hayes* agt. *Dickinson*, 9 *Hun*, 277.)

5. Where a bonus has been paid for the extension of a mortgage, and the interest falling due thereafter is not paid, and an action is brought to have the mortgage foreclosed, the mortgagor cannot claim to have the bonus applied on the interest, discharging the same, and the action dismissed. (*Church* agt. *Maloy*, 9 *Hun*, 148.)

6. The provisions of section 385 of the Code, giving defendant costs where plaintiff does not accept an offer of judgment, and fails to obtain a more favorable one, applies to foreclosure suits where a personal judgment against the obligor for any deficiency is asked. (*Bathgate* agt. *Haskin*, 36 *N. Y. R.*, 261.)

7. The fact that after defendant has offered to allow judgment for all that plaintiff is entitled to demand, an application to the court is necessary in order to perfect the judgment does not take the case out of the statute. (*Id.*)

8. A purchaser at a foreclosure sale, not put upon his guard by some prior notice, may insist upon a good title, and will not be required to pay the purchase-money and accept a deed where there is any serious defect in the title, unless it is remedied; but where he purchased with knowledge of the defect, its existence will not justify him in refusing to complete the purchase. (*Fryer* agt. *Rockefeller*, 36 *N. Y. R.*, 268.)

9. A title by foreclosure sale is not defective because of a failure to record an assignment of the mortgage. There is no legal need of a record or of a written assignment: a good assignment may be made by delivery only. (*Id.*)

FOREIGN JUDGMENT.

Injunction — it is within the power of the supreme court of this state to enjoin a party from enforcing

the collection of a judgment recovered by him in another state. (*See Barry* agt. *Brune*, 8 *Hun*, 395.)

FRAUD.

1. Although a banker or trader in embarrassed circumstances, who is struggling in good faith to retrieve his fortunes, is not compelled to disclose the fact of his embarrassment to persons dealing with him; yet, if he is at the time hopelessly insolvent, he is guilty of a fraud, if, by virtue of his supposed solvency and well-established credit, he contracts obligations which he cannot reasonably expect to pay. (*Roebling* agt. *Duncan*, 8 *Hun*, 502.)

2. Persons dealing with a banker in good faith, and in reliance upon his apparent solvency, will be protected against the consequences of the concealment by the banker of his real condition, if he is at the time not merely insolvent but bankrupt, and where such concealment involves a degree of bad faith from which the law will imply fraud, although no actual representation has been made. (*Id.*)

3. An action was brought upon a promissory note given in 1869, but upon which payment had been made within six years. After the time to answer had expired, plaintiff procured an order of arrest, on an affidavit that the note was given for the balance of a credit for goods sold to the defendant in 1868, upon fraudulent representations then made by him. *Held*, (1) that as this action was upon the note, an order of arrest could not be procured on the ground that the debt for which it was given was fraudulently incurred; (2) that the claim arising from the fraud was barred by the statute of limitations, and that the payment kept alive the note and not the fraud. (*Fritts* agt. *Slade*, 9 *Hun*, 145.)

4. Where one joint owner of a boat sells it to a party, with an understanding between himself and such party, unknown to his co-owners, that he is to own one-half on paying half the price, such sale is fraudulent and void as against the co-owner; and on a future sale, at a higher price, such co-owner may ratify the second sale and sue for his share of the price, or may repudiate it and sue for conversion of the property. (*Small* agt. *Robinson*, 9 *Hun*, 418.)

FRAUDULENT CONVEYANCE.

1. Where a debtor, with the intent on his part of defrauding his creditors, executes a conveyance of his property to his wife, without any valuable consideration being paid by the grantee, the conveyance will be set aside as fraudulent as against such creditors. (*Smart* agt. *Harring*, *ante*, 505.)

2. And this is so, although the wife received the conveyance without knowledge of such fraudulent intention on the part of the husband. (*Id.*)

3. Where the evidence showed that the wife parted with nothing of value, save the effect which the giving of a certain mortgage, which she executed in conjunction with her husband, might have upon her dower interest in the property, provided she survived her husband:

Held, that the facts did not establish a valuable and adequate consideration, legal or equitable, in favor of the wife, so as to present a case which would entitle her to protection, although the jury found that she had no knowledge of her husband's fraudulent intent. (*Id.*)

FRAUDULENT REPRESENTATIONS.

1. Upon the trial of an action brought by the plaintiff to recover

damages for fraudulent representations, by means of which he was induced to deliver to the defendant his three promissory notes, each for $500, with interest, it appeared that all the notes were still in the possession of the defendant, and that one of them was then overdue. The court charged that the plaintiff was entitled to recover the face of the notes, with interest. Upon appeal from a judgment in favor of the plaintiff, *held*, that this was error; that the verdict of the jury established the invalidity of the notes in the hands of the defendant; and that as to the note then overdue, the plaintiff was only entitled to nominal damages; that he was entitled to recover the face of the other two, with interest, as they might be transferred before maturity to *bona fide* purchasers in good faith. *Held*, further, that if the defendant had canceled or surrendered the other notes at the trial, plaintiff could only have recovered nominal damages for them also. (*Thayer* agt. *Manley*, 8 *Hun*, 550.)

2. The firm of Lynde Bros., in order to induce a firm in Buffalo to sell them goods, made certain false and fraudulent representations as to their financial condition to Robinson, the salesman of the Buffalo firm. Subsequently the plaintiffs succeeded to the business of said Buffalo firm, and retained Robinson in their employment. Shortly after Lynde Bros. applied for other goods, which were sold to them by Robinson, he relying upon the representation previously made by them. In an action by the plaintiffs to recover the goods so sold, on the ground that they were procured through fraudulent representations, *held*, that they were not entitled to recover; that, in order to maintain such action, the representations must be made to the vendors, or to some person acting in their behalf, while in this case the representations were made to the agent of another firm, and before that of the plaintiffs came into existence. (*Hill* agt. *Carley*, 8 *Hun*, 686.)

GENERAL ASSIGNMENT.

1. The omission of an assignee for the benefit of creditors to file the bond required by section 8 of chapter 348 of 1860, does not — certainly until the inventory is filed — *per se* invalidate the assignment. (*Von Hein* agt. *Elkus*, 8 *Hun*, 516.)

2. The right to make a general assignment for the benefit of creditors is not suspended by the provisions of the bankrupt act, provided such assignment contains no preferences and is not made with intent to defraud the creditors of the assignors. (*Id.*)

GENERAL TERM.

1. It is not an objection to a judgment of general term that one of three judges hearing the appeal died before the decision, and that it was made by the other two; two judges may hold a general term and decide cases there argued. (*Campbell* agt. *Seaman*, 63 *N. Y. R.*, 569.)

HABEAS CORPUS.

1. An order by a competent tribunal committing a child found in an employment contrary to the act of 1876, to prevent and punish wrongs to children (*Laws of* 1876, *chap.* 122, *p.* 95), is a final judgment in the matter, within the meaning of the *habeas corpus* act. (*Matter of Donohue*, *ante*, 251.)

2. The constitutionality of the statute under which the commitment was made cannot be impeached upon *habeas corpus* proceedings, as this would be inquiring into the *legality* of the judgment. (*Id.*)

Digest.

3. By section 8 of the act of 1876, which authorizes any court or magistrate to commit to an asylum, &c., any child engaged or used in violation of the act, the recorder of the city of Poughkeepsie had full power to commit these children to the care of the New York Society for the Prevention of Cruelty to Children. (*Id.*)

4. The act of 1876 (*Laws of* 1876, *p.* 95, *chap.* 122), entitled "An act to prevent and punish wrongs to children," *held*, to be constitutional. (*Id.*)

See COSTS.
Matter of Barnett, ante, 78.

HIGHWAY.

1. Where permission is granted, by the commissioners of highways, to a railroad company "to construct and maintain a bridge over a crossing," the acceptance thereof by the company and the construction of a bridge thereunder imposes upon it the duty of maintaining the same in good repair. (*Hayes* agt. *N. Y. Cent. and Hud. R. R. R. Co.*, 9 *Hun*, 63.)

2. The approaches to the bridge, which are necessary to connect the same with the highway, are a part thereof, and the same duty is imposed upon the company as to their repair and maintenance, as exists in regard to the bridge itself. (*Id.*)

3. Such duty exists as well toward the surface of such approaches, as toward the foundation and substructure thereof. (*Id.*)

INDICTMENT.

1. The general rule of pleading is that the indictment must apprise a party of the crime whereof he or she is accused. (*People* agt. *Hallenbeck, ante*, 502.)

2. An indictment for uttering, writing and publishing a lewd and indecent paper was in the following language, viz.: "Did utter, write and publish a certain obscene, lewd and indecent paper and writing, which said paper was inclosed in a sealed envelope and deposited in the post-office of the United States, at said town of Catskill, for mailing and delivery; the said envelope being then and there addressed by the words following, that is to say, 'Mrs. Mary T. Westmore, Catskill, N. Y. :'"

Held, that the indictment could not be upheld. There should be some *general description* of the writing. It is not necessary to copy the paper or minutely describe the print, but it is necessary to give a *general description* thereof and to aver their evil tendency; sufficient information should be suggested to put the defendant on inquiry as to her defense and the *subject* of the obscenity should be stated. (*Id.*)

3. The plaintiff in error, an unmarried woman, was convicted under 2 Revised Statutes (*Edm. ed.*), 710, section 11, of unlawfully marrying one Simons, he being then a married man. The indictment alleged the marriage, and further, "she, * * * at the time of marrying * * * the said Conrad L. Simons, well knowing that the said Conrad L. Simons was then and there the lawful husband of Anna M. Simons, and had previously been lawfully married to the said Anna M. Simons." It contained no other allegation as to the marriage of Conrad L. and Anna M. Simons. *Held*, that the indictment was fatally defective, in that it did not sufficiently allege the marriage of the said Conrad L. and Anna M. Simons. (*Sauser* agt. *People*, 8 *Hun*, 302.)

Digest.

INFANTS.

1. Before the statute (*Laws of* 1852, *chap.* 277) was enacted, an infant could not maintain an action for partition at all; under it whether the infant sue alone or be joined as co-plaintiff with other parties in interest, the conditions of the statute must be strictly complied with, upon which the privilege of maintaining the suit is accorded to the infant. (*Struppman* agt. *Muller*, *ante*, 211.)

2. It is irregular to institute proceedings in partition on behalf of an infant, without first obtaining the authority of the court. (*Id.*)

3. The mere joinder with such infant of a tenant in common, as co-plaintiff, will not dispense with the necessity, on the part of the infant, of obtaining the authority to sue, which, under the statute, is a condition precedent to the maintenance of the action; or authorize a decree of sale, except under the conditions which the statute imposes. (*Id.*)

4. Partition will not be ordered upon the application of an infant, unless it be made satisfactorily to appear that the interests of the infant require such partition or sale. (*Id.*)

5. An action of *partition* cannot be prosecuted by or in behalf of *an infant* as plaintiff without the appointment by the court of a *next friend*, pursuant to the act of 1852. (*Id.*)

6. It is erroneous to allow an infant in proceedings in partition, to act by guardian without security. (*Id.*)

7. Persons having adverse or conflicting rights in relation to the subject-matter of a litigation ought never to be joined as complainants. (*Id.*)

8. *It seems* doubtful whether a person claiming interests in the property adverse to that of the infant, such as a right during his life to the rents and profits of land to which they are entitled in remainder, or an interest in the enforcement of an equitable lien upon that land, may join them as co-plaintiffs with himself in a suit to enforce his own right and remedies in *these* respects, and as their guardian *ad litem*, may prosecute such suit, in his own behalf, to a decree in his own favor, impairing or divesting them of their title for the purpose of establishing his own. (*Id.*)

9. Where the rights and interests of infants are involved, purchasers at judicial sales will be discharged from their purchases, where reasonable doubt exists as to the validity of the title thereby acquired. (*Id.*)

10. A judgment rendered against an infant who is duly summoned and has a guardian *ad litem* appointed, who accepts the trust, will bind and conclude him as if he were an adult. (*Phillips* agt. *Dusenberry*, 8 *Hun*, 348.)

11. The practice of giving minors six months after coming of age to show cause against decrees rendered against them during their minority, applied only to actions in equity, and not to actions at law for the recovery of money due on contract, and this rule is now abrogated by statute, providing for the appointment of guardians *ad litem*. (*Id.*)

INJUNCTION.

See CONSTITUTIONAL LAW.
Hurlburt agt. *Banks*, *ante*, 196.

See TRADE-MARK.
Decker agt. *Decker*, *ante*, 218.

Digest.

1. In proceedings to ascertain the damage resulting from the granting of an injunction, damages directly caused by the act of divesting the enjoined party of his property and putting it in the hands of a receiver are allowable, but not such as flow from the bad management of the receiver afterwards. (*Hotchkiss* agt. *Platt*, 8 *Hun*, 16.)

2. Counsel fees on the trial of the action in which the injunction was granted are not allowable as damages, without evidence that the expense of the trial was increased by the injunction. (*Id.*)

3. An allowance made by the court to the receiver in managing the property is not allowable as damages, when the sum so paid is no greater than the defendant, who did not manage the property before the receivership, but employed another person to do it, would have paid for similar services if no receiver had been appointed. (*Id.*)

4. Any loss of property or diminution of profits occurring in consequence of the change in the custody and control of defendant's goods or stoppage of defendant's business is allowable. (*Id.*)

5. Where a contract with the city of New York for paving a street provided that the city would pay in cash, on the confirmation of the assessment to be laid for said work, the whole of the money accruing to the other party under agreement; and no assessment had ever been laid for the work, the city and the board of assessors having been enjoined by the court in an action by the property owners from confirming the assessment:

Held, in an action to recover the balance due on the contract, that when the defendants were stopped by process from obtaining the funds, all they could demand was a reasonable time to remove the impediment, and the failure to do any thing to remove the injunction rendered them liable for the plaintiff's claim. (*Bowery Nat. Bank* agt. *Mayor*, 8 *Hun*, 224.)

6. That it was error for the judge to leave it to the jury to find the fact whether or not the assessment had not been confirmed because of any collusion, fraud, negligence or other improper act on the part of the defendants, for the facts being undisputed, the question of reasonable diligence was one for the court, and especially where its subject-matter, namely, a law-suit, was one of which the court could take judicial cognizance; and the plaintiff was entitled to its request that the jury be instructed to render a verdict in its favor. (*Id.*)

7. An injunction issued in proceedings in bankruptcy does not apply to property levied on by a sheriff, where the levy has been made before the commencement of proceedings in bankruptcy against the judgment debtor. The possession and legal title being in the sheriff for the purpose of satisfying the process in his hands, he has the right to go on and sell the property, being accountable only for the surplus, if any, to the bankruptcy court. (*Ansonia Brass and Copper Co.* agt. *Babbitt*, 8 *Hun*, 157.)

8. Where one manufacturing brick upon his lands uses a process in burning by which noxious gases are generated, which are borne by the winds upon the adjacent lands of his neighbor, injuring and destroying trees and vegetation, this is a nuisance, and the party injured may maintain an action to recover damages and to restrain the use of the process complained of. (*Campbell* agt. *Seaman*, 63 *N. Y. R.*, 568.)

9. It is immaterial that the damage done is to ornamental trees and

shrubbery only; articles of luxury are as much under the protection of the law as articles of necessity. (*Id.*)

10. So, also, it is immaterial that the injury is only occasional. It is sufficient to authorize an injunction that injury may be expected whenever a kiln is burning, unless the poisonous gases are blown away from plaintiff's land. (*Id.*)

11. It does not affect plaintiff's right to an injunction that the brick yard was used before plaintiff purchased his land. (*Id.*)

12. No acquiescence short of twenty years will bar one from complaining of a nuisance, unless by some act or omission he has induced the party causing the nuisance to incur large expenditures, or to take some action upon which an estoppel may be based. (*Id.*)

13. If a party may acquire a prescriptive right to continue a nuisance, it can only be by continuous use for twenty consecutive years. (*Id.*)

14. A writ of injunction can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicy of suits, and its refusal in a proper case is error, to be corrected in an appellate court. (*Id.*)

15. The discretion of the court below in granting or refusing the writ is not an arbitrary one; and, if improperly exercised, may be corrected on appeal. (*Id.*)

16. Where the provisions of a judgment entered upon the report of a referee as to an injunction are broader and more unlimited than authorized by the report, the error cannot be corrected upon appeal from the judgment; the remedy of the party aggrieved is to move to set aside or to correct the judgment. (*Id.*)

INQUESTS.

1. Rule 36, authorizing inquests to be taken in cases in which no sufficient affidavit of merits has been made and served, does not apply to actions in equity. (*Devlin* agt. *Shannon*, 8 *Hun*, 581.)

2. In an action to foreclose a mortgage, an inquest taken by the plaintiff upon defendant's failure to file an affidavit of merits, is irregular, and a judgment entered thereon will be set aside. (*Id.*)

INSPECTORS OF ELECTION.

1. To warrant a conviction of an inspector of election, chosen under a state law, for making a false certificate of the result of a canvass for representative in congress, it must appear that the certificate was made by such inspector fraudulently; and the fact that a fraud upon the ballot-box was committed by some unknown person, no agency of the inspector being shown, is not sufficient to warrant a conviction under section 5515 of the United States Revised Statutes. (*United States* agt. *Hayden et al.*, *ante*, 471.)

2. It is not a criminal neglect of duty for an inspector of election to deliver the keys of a ballot-box, on the morning of election, to a policeman assigned by the city authorities to do duty at the poll on election day, where this is proven to have been the custom in the city in which the election was held, and where it is under the apparent sanction, though not strict construction, of the police law of the city. (*Id.*)

3. The Revised Statutes of New York prescribe that the ballots, in certain specified boxes, shall be canvassed in a particular order; a failure by the inspectors to canvass in that order, in the absence

of a guilty or improper motive, is not a criminal offense. (*Id.*)

4. The court should always direct a verdict of not guilty where it is of opinion that the evidence will not authorize the jury to find a verdict of guilty, or if so found would set aside the verdict as contrary to evidence. (*Id.*)

INSURANCE.

1. Where one clause of a policy of insurance provided that no action should be sustainable thereon in any court, unless it was commenced within the term of twelve months next after any loss or damage should have occurred, and another clause provided that the loss should not be deemed payable until proofs and declarations and certificates were produced and examination submitted to if required, and that payment of losses should be made sixty days after the loss had been ascertained and proved, *held*, that the twelve months within which the action must be brought did not commence to run until the expiration of sixty days after the loss had been ascertained and proved. (*Mix* agt. *Andes Ins. Co.*, 9 *Hun*, 397.)

2. A bond and mortgage executed by a husband to his wife for a just and valuable consideration may be enforced in equity, and the wife acquires an equitable interest in the property covered thereby, and may insure the same. (*Id.*)

INTEREST.

1. Where a sum is left in trust, with direction that the interest and income be applied to the use of a person, such person is entitled to interest from the death of the testator (*Following Cook* agt. *Meeker*, 36 *N. Y.*, 15). (*Matter of Lynch*, *ante*, 367.)

2. The authorities on this subject collected in the opinion and carefully examined. (*Id.*)

INTERPLEADER.

1. Where upon the application of the defendant an order is made, in pursuance of section 122 of the Code, directing that he pay into court the money, to recover which the action is brought, and that a third person, by whom the same is claimed, be substituted as defendant in his place, the plaintiff should apply for leave to serve a supplemental complaint setting forth such additional facts, as may be necessary to show that he has a right to recover the amount claimed as against the defendant. (*Wilson* agt. *Lawrence*, 8 *Hun*, 593.)

2. If the plaintiff fail so to do, and proceed to trial upon the original complaint, the substituted defendant may move to dismiss the same, on the ground that as to him it does not state facts sufficient to constitute a cause of action. (*Id.*)

IRRELEVANT MATTER.

1. The responsibility for the insertion of irrelevant and scandalous matter in pleadings rests upon the attorney preparing the same, and he should be charged with the payment of the costs of a motion to have such matter stricken therefrom. (*McVey* agt. *Cantrell and Taddiken* agt. *Cantrell*, 8 *Hun*, 523.)

JOINDER.

1. The representatives of a deceased defendant may be joined with a surviving defendant in an action upon a joint liability where the insolvency of the surviving partner is averred. (*Divine* agt. *Duncan*, *ante*, 446.)

Digest.

Of administrator and heirs — in an action for an accounting concerning the affairs of a partnership — is proper, although the interests of the several defendants did not accrue in the same right. (*See Sleidmore* agt. *Collier*, 8 *Hun*, 50.)

JOINT DEBTOR.

1. In an action againt A., B. and C., copartners, C. died; thereafter judgment by default was entered against A. and B. Afterwards, on motion, the administrator of C. was substituted in place of C. as sole party defendant. *Held*, error; that in such case the action against the administrator should be a new one, arising because of the original debt, the death of one joint debtor, the appointment of his representatives and the insolvency of the surviving joint debtors, and not a continuance of the original action against all the joint debtors. (*Masten* agt. *Blackwell*, 8 *Hun*, 318.)

JUDGE'S CHARGE.

1. Upon the trial of the plaintiff in error for rape, the court refused to charge that he must have "accomplished his purpose in spite of the utmost reluctance and resistance on her part." The prisoner was convicted of an assault with intent to commit rape. Upon a writ of error to review this conviction, *held*, that as the refusal to charge, even if it were error, did not in any way affect the crime of which he was convicted, but only that of which he was acquitted, it furnished no ground to reverse judgment. (*Myer* agt. *People*, 8 *Hun*, 528.)

JUDGMENT.

By default — irregular — if relief taken is greater than that asked for in complaint. (*See Andrews* agt. *Monlaws*, 8 *Hun*, 65.)

1. Where, in an action to redeem certain premises from the effect of a deed absolute in form, but alleged to be in fact a mortgage, the defendant interposed an answer denying certain allegations of the complaint and setting up four counter-claims, to which counter-claims plaintiff demurred, upon which demurrer judgment was subsequently ordered for the defendant, who thereupon entered a judgment in his favor for the amounts claimed therein, *held*, that the judgment was irregular and should be set aside; that no judgment should have been entered in the action until all the issues raised therein had been disposed of. (*Bucking* agt. *Hauselt*, 9 *Hun*, 633.)

Payments on — proof of, offered to avoid statute of limitations — Declarations of party attempting to prove them, to the effect that there was no consideration for the judgment — that it was confessed to cover up judgment debtor's property — admissible to show improbability of payments having been made thereon — illegal agreement — enforcement of. (*See Rumsey* agt. *Cook*, 9 *Hun*, 129.)

Entry of, on failure to answer, on admission of service of summons as of prior day and before the expiration of twenty days from acual service — not fraudulent. (*See Rock* agt. *Richardson*, 9 *Hun*, 567.)

2. A judgment in an action for an accounting between partners, requiring the payment of a specified sum of money by one of the parties to a receiver, may be docketed in favor of the receiver and be enforced by execution. (*Geery* agt. *Geery*, 63 *N. Y. R.*, 252.)

3. An action, based upon the judgment, brought to set aside conveyances of real estate made by

the party so charged as in fraud of creditors, and to reach his real estate and equitable assets, cannot be maintained without first docketing such judgment and issuing execution thereon. (*Id.*)

4. There is no distinction in this respect between judgments for the payment of money in legal and in equitable actions. In either case a suit in equity to enforce the judgment cannot be maintained until the statutory remedy by execution is exhausted. (*Id.*)

5. *It seems*, that the record of the decision of an appellate court is the highest evidence of what the court decided, and where a point appears thereby to have been adjudicated, it is controlling, even if the opinion delivered contains adverse expressions. (*Un. Nat. Bk.* agt. *Kupper*, 63 *N. Y. R.*, 617.)

6. If there was a mistake in the judgment rendered, the remedy is by motion to correct it. (*Id.*)

JUDICIAL SALE.

1. Upon a sale had under the foreclosure of a mortgage, the premises were bid in by the attorney for the plaintiff, for an amount sufficient to pay the first mortgage, the fees of the sheriff on the sale, and a second mortgage owned by the defendant Wood. The sheriff received the amount of his fees, but not the amount of the Wood mortgage, she having agreed that said amount should be secured upon the premises by the purchaser. No security was ever given by him thereon, but he paid the interest to the defendant Wood for many years, until he finally sold the premises to a *bona fide* purchaser, without notice. In an action brought by the defendant Wood, to charge the sheriff with so much of the bid as he had neglected to collect, *held*, that though it was the duty of the sheriff to have collected the whole bid, yet as he had neglected to do so at the instigation of the defendant Wood, the latter could not now insist that he erred in so doing. (*Dickson* agt. *Fraser*, 9 *Hun*, 191.)

JURISDICTION.

1. The marine court has jurisdiction of actions where the amount recovered does not exceed $2,000. It does not matter what is the amount claimed, if the sum finally recovered does not exceed $2,000, exclusive of costs. (*In re Barbour*, *ante*, 94.)

See SURROGATE.
People ex rel. Weatherhead agt. *Waldron*, *ante*, 221.

2. A court acquires jurisdiction of an action against an absentee defendant domiciled in the state in which the court is situated, where such absentee is served by publication as prescribed by the law of such state, and a judgment rendered in such action is valid in all other states and countries. (*Hunt* agt. *Hunt*, 9 *Hun*, 620.)

3. Not obtained by the court in action of divorce in the state of Ohio where summons was not mailed to defendant, the record alleging the defendant's residence to be unknown, when in fact it was known. (*See Stanton* agt. *Crosby*, 9 *Hun*, 370.)

4. The provision of the Code authorizing the submission of a controversy without action (*sec.* 372) only contemplates the determination of questions between the parties and affecting their interests, and the court has no power to go beyond a decision affecting such interests. (*Un. Nat. Bk.* agt. *Kupper*, 63 *N. Y. R.*, 617.)

5. Surrogate has jurisdiction to determine upon sufficient evidence

as to death, upon application for letters of administration, and such letters are valid to protect innocent persons acting under them, although the alleged intestate was not in fact dead. (*Id.*)

JURY.

1. Where the foreman of a jury, by mistake, announces a verdict different from that agreed to by the jury, and the erroneous statement is taken and recorded, the court, upon application made at the same circuit immediately after the entry of the erroneous verdict, has power to correct the record so as to make the verdict conform to the actual finding. (*Dalrymple* agt. *Williams*, 63 *N. Y. R.*, 361.)

2. Affidavits of the jurors showing the mistake may be received upon such application (FOLGER, *J.*, *dissenting*). (*Id.*)

3. The rule prohibiting jurors from being heard to impeach or effect a verdict rendered by them does not apply, as the application is not to reverse their action but to establish it.

JURY TRIAL.

See ADVERSE POSSESSION.
Therasson agt. *White*, *ante*, 63.

JUSTICE'S COURT.

1. A summons having been issued in a civil action by a justice of the peace of the town of New Lots, Kings county, and personally served on the defendant in the city of Brooklyn, in said county, of which he was a resident, and on default judgment entered, a transcript thereof filed, and the judgment docketed against him in the clerk's office of said county, and execution issued thereon; and the county court having, on an order to show cause, directed that the said transcript be set aside and the clerk of Kings county cancel the judgment of record:

Held, that section 16 of chapter 102, Laws of 1850, which declares: "No justice of the peace, other than the police justice and the justices elected in the city of Brooklyn, shall have, or exercise any civil or criminal jurisdiction in said city," was intended to give to the police justices and justices elected in Brooklyn exclusive jurisdiction to hold courts in that city, but not to take away the general jurisdiction of the justices of the peace of the county, to try transitory actions within their jurisdiction in their own towns. That the justice in this case exercised no jurisdiction in the city of Brooklyn. He simply issued a summons to the town of New Lots, out of the city, and upon proper return of personal service proceeded with the case in his own town, and entered judgment, the constable's return giving him jurisdiction of the person of the defendant.

Held, further, that the county court had no power, on motion, to set aside the transcript and vacate the judgment; that the remedy of the defendant was by appeal. (*Douglass* agt. *Reily*, 8 *Hun*, 85.)

2. Upon an appeal to the county court from a judgment rendered in a justice's court, it is the duty of the former, when a new trial is to be had before it, to pass upon all questions raised in the court below as to the jurisdiction of the justice, the regularity of the process, its service and return, and whether all the proper parties are before the court; and in case it refuses so to do and compels the appellant to proceed with a new trial, upon which a judgment is rendered against him, the general term will, upon an appeal from

such judgment, reverse the same and direct a new trial, even though such objections were frivolous and devoid of merit. (*Maxon* agt. *Reed*, 8 *Hun*, 618.)

3. This action was brought in a justice's court to recover the damages occasioned by the negligent and careless act of the defendant, in discharging the waste and surplus waters from his lot upon that of the plaintiff. Upon the trial, plaintiff gave proof, without objection, that he was in occupation of the lot, and described it as his. Subsequently, it appeared that the plaintiff did not live on the premises. The defendant moved for a nonsuit on the ground that the plaintiff was not in possession and occupancy of the premises, which motion was denied. *Held*, that this motion did not bring in question plaintiff's title to the premises, and that the justice was not thereby deprived of jurisdiction over the action. (*Ryan* agt. *Harrigan*, 9 *Hun*, 520.)

LANDLORD AND TENANT.

1. Where one passing upon the sidewalk is struck and injured by snow which has slid from a roof (so constructed as to render the snow falling upon it liable to be precipitated upon the sidewalk), the owner of the building is liable for the injuries thereby occasioned, even though the building be at the time in the occupation of a tenant, who is bound to make all needful repairs. (*Walsh* agt. *Mead*, 8 *Hun*, 387.)

LEGACY.

1. Where a parent or other person *in loco parentis*, bequeaths a legacy to a child or grandchild, and afterwards, in his lifetime, gives a portion or makes a provision for the same child or grandchild *without expressing it to be in lieu of the legacy, it will, in general, be deemed a satisfaction or ademption of the legacy.* (*Degraaf* agt. *Teerpenning*, *ante*, 313.)

2. The legacy is to be considered a portion, and if the testator afterwards advances the *same sum* upon the child's marriage, or the happening of any other event, he is to be deemed to have done it to accomplish his original object in giving a portion. Under such circumstances it will be held to be intended by the testator as a satisfaction and not a double portion. (*Id.*)

3. The presumption is that the legacy, where a payment to the amount thereof is made to the legatee, has been adeemed, and such presumption is conclusive unless overcome by proof. (*Id.*)

4. This presumption may be overcome by evidence that such was not the intention, and when such evidence is offered it may be answered by other evidence of the same character. The whole question is one of intention. (*Id.*)

5. By the will certain real estate was devised to the defendants, who were sons of the testator as tenants in common. Each of these devises was declared to be "upon this express condition, that he pay, or cause to be paid, such legacies, and perform such acts and pay such moneys as I shall herein enjoin upon him to perform." The legacy bequeathed to the plaintiff, Ann Eliza, by the will, and which is the subject of this litigation, is in these words: "Fifthly. I give and bequeath unto my daughter Ann Eliza $400, to be paid unto her one year and one day after my decease, provided she has lawful issue, and if she has no lawful issue, then I order and will that my two sons pay to her the interest of the $400 yearly, and every year during her natural lifetime,

and after her decease I give and bequeath the said $400 unto my surviving daughters, and their children, if they should have deceased, and if, and when she shall have issue, the money shall be paid to her." The codicil declares; "And whereas in my said last will I have given to my daughter the sum of $400, now, it is my will, that if my said daughter Ann Eliza die without lawful issue, then the same is hereby given to my daughters, and not to my sons, to be divided to my said daughters equally." The testator died October 6, 1847, and the will was admitted to probate November 6, 1847. On the day the codicil to the will was prepared the testator gave to his daughter, Ann Eliza, the plaintiff, the sum of $400 in money, saying to her, "take this as a present from your father." The husband of the plaintiff, at the same time, signed a note for it, but has never been called upon to pay the note. A similar sum was handed to the other daughters, accompanied with the same remark. The husband of the plaintiff, in the years 1848, 1849 and 1850, made a demand of the defendants, of the interest due his wife, which was refused, claiming that the legacy had been paid by the testator during his lifetime. This action was commenced in 1876.

Held, that the legacy was extinguished and paid during the testator's lifetime. The mere fact of taking the note of the plaintiff's husband was not inconsistent with the ademption of the legacy, the bequest of which legacy was never that of an absolute gift to the daughter, unless she had issue, but only of the income during life. Nor is the presumption of the ademption of the legacy overcome by the clause in the codicil. (*Id.*)

6. The relief sought is a judgment of this court, that the legacy, together with accrued and accruing interest, is a lien upon the real estate of the defendants, and that the plaintiff is entitled to a decree of sale of so much thereof as shall extinguish the past interest, and obtain the principal sum of $400, which she asks shall be duly invested, that she may hereafter obtain the annual interest thereon, that in the end the ultimate payment of such principal in conformity with the will and codicil may be assured.

Held, that if the plaintiff is entitled to a judgment declaring that the legacy is a charge upon the realty (which seems very doubtful), she was so entitled to bring an action for that purpose, immediately after her demand in 1848 was refused. More than twenty years having elapsed since the right to bring such an action accrued, it is barred by the statute of limitations. (*Id.*)

7. Where a sum is left in trust, with direction that the interest and income be applied to the use of a person, such person is entitled to interest from the death of the testator (*Following Cook* agt. *Meeker*, 36 *N. Y.*, 15). (*Matter of Lynch*, *ante*, 367.)

8. The authorities on this subject collected in the opinion and carefully examined. (*Id.*)

9. Section 82 of article 3, title 3, chapter 6, part 2 of the Revised Statutes, authorizing any person entitled to any legacy or to a distributive share of the estate of a deceased person, to apply to the surrogate, at any time previous to the expiration of one year from the granting of letters testamentary or of administration, to be allowed to receive such portion of such legacy or share as might be necessary for his support, only applies to cases in which the title of the party to a distributive share is undisputed and free from doubt, and where such is not the case the surrogate has no authority to hear and determine proceedings instituted thereunder. (*Ketelias* agt. *Green*, 9 *Hun*, 599.)

Digest.

LEGAL ACTION.

1. A person bringing a legal action cannot be compelled to sue any person except such as he may elect to sue. A defendant cannot convert such action into an equitable one by interposing an equitable defense. Such defense must stand and be tried upon its merits, as a mere naked defense. (*Webster* agt. *Bond*, 9 *Hun*, 437.)

2. Accordingly, where a defendant in an action of ejectment alleged that the deed under which the plaintiff's grantor claimed was in fact a mortgage, and that the same had been paid and discharged, *held*, that he was not entitled to an order requiring the plaintiff to bring in the executors of his deceased grantor as necessary parties to the action. (*Id.*)

3. Section 122 of the Code, authorizing the bringing in of additional parties, only applies to equitable actions. (*Id.*)

LIBEL.

1. This action was brought to recover damages for a libel concerning the plaintiff, published in a newspaper owned and managed by the defendant. It appeared upon the trial that the report was received from an established news agency; that it was published in but one edition of the paper and suppressed in the subsequent ones; that some of the copies of the paper unsold when it was discovered were not destroyed, and one copy was sold, and that on the following day a retraction was published. There was no proof of actual malice on the part of the corporation or any of its officers. *Held*, that the evidence would not authorize the jury to find that there was *actual* malice on the part of the defendant, and that a verdict awarding *exemplary* damages should be set aside. (*Samuels* agt. *Evening Mail Association*, 9 *Hun*, 288.)

LIEN.

1. The defendant was the holder of a first mortgage on premises on which there was a prior judgment. The plaintiff was the assignee of a mortgage on the same premises between which and the defendant's mortgage there existed two other mortgages. Prior to the assignment of the mortgage to the plaintiff, the holder of the aforesaid judgment agreed with plaintiff's assignor to postpone the lien of such judgment to that of the mortgage assigned plaintiff. In January, 1875, the premises were sold under the judgment, and purchased by the defendant, the holder of the first mortgage, the sale being made without notice of the agreement to make it subordinate to plaintiff's mortgage.

   In February, 1875, the defendant foreclosed its mortgage, made the plaintiff a party defendant as subsequent incumbrancer, who appeared by attorney, but put in no answer. Judgment of foreclosure and sale was entered March 22, 1875.

   May 21, 1875, plaintiff tendered the defendant the amount due on the foreclosure judgment, and demanded an assignment of the mortgage and judgment. Defendant refused to receive the money unless the plaintiff would pay the additional sum for which the premises were sold to it, on the execution issued under the prior judgment:

   Held, that the tender did not discharge the lien; that the plaintiff had no standing as to the land which entitled him to an assignment of the defendant's mortgage. (*Frost* agt. *Yonkers Savings Bank*, 8 *Hun*, 26.)

2. *Held*, *also*, that the holder of the judgment having the title and the right to enforce it, making no res-

ervation and giving no notice indicating that it was not what it purported to be, viz., the first lien on the property sold, the purchaser at the sheriff's sale took the title, without reference to the agreement made by such judgment creditor postponing its lien. (*Id.*)

3. A constable levied on certain property under a judgment in favor of the defendant, against the plaintiff, and committed the property to the defendant as a receiptor. *Held*, that the latter acquired a valid lien upon the property, for his just and lawful charges as such; and that payment of the judgment to the sheriff, upon the judgment of affirmanee, rendered upon appeal to the county court, did not discharge the lien of the defendant, or of the constable for his fees. (*Aliger* agt. *Keeler*, 8 *Hun*, 125.)

LIMITATION OF ACTIONS.

1. The relief sought is a judgment of this court, that the legacy, together with accrued and accruing interest, is a lien upon the real estate of the defendants, and that the plaintiff is entitled to a decree of sale of so much thereof as shall extinguish the past interest, and obtain the principal sum of $400, which she asks shall be duly invested, that she may hereafter obtain the annual interest thereon, that in the end the ultimate payment of such principal in conformity with he will and codicil may be assured:

Held, that if the plaintiff is entitled to a judgment declaring that the legacy is a charge upon the realty (which seems very doubtful), she was so entitled to bring an action for that purpose, immediately after her demand in 1848 was refused. More than twenty years having elapsed since the right to bring such an action accrued, it is barred by the statute of limitations. (*Degraaff* agt. *Teerpenning*, *ante*, 318.)

MALICIOUS PROSECUTION.

1. An action for malicious prosecution may be maintained for instituting civil suits, where the suits are commenced maliciously and without probable cause and terminated in favor of the plaintiff. (*Dempsey* agt. *Lepp*, *ante*, 11)

2. In such a case an order of arrest, under section 179 of the Code, is authorized. (*Id.*)

3. Defendant, the owner of a fishing boat, found, on going to look for it on several occasions, that it had been taken from its mooring. It was brought back, however, once with a net, another time with a net and some sea filth, left in it. The third time it was taken he caused plaintiff, who took the boat, to be arrested for grand larceny. In an action by plaintiff for malicious prosecution, *held*, that there was an entire want of reasonable grounds for believing the party guilty of that crime, and that malice might be inferred from such want of probable cause. (*Wanser* agt. *Wyckoff*, 9 *Hun*, 178.)

MANDAMUS.

1. Positive allegations in moving affidavits are not put in issue by denials upon or for want of information in answering affidavits. (*People ex rel. Carleton* agt. *Assessors of New York*, *ante*, 140.)

2. The board of assessors of the city of New York is authorized and directed to estimate the damage sustained by owners of property by reason of the closing of streets and roads by the Central Park Commissioners. (*Id.*)

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3. Upon an application for a *mandamus*, if the substantial allegations in the moving affidavits are not fully met or avoided in the answering affidavits, a peremptory writ should be granted in the first instance. (*Id.*)

4. Where parties have acquiesced for nearly two years in the proceedings sought to be set aside, a *mandamus* will not be granted. (*People ex rel. Gas-light Company* agt. *Common Council, ante*, 346.)

5. The writ is allowable in the discretion of the court. The delay for so long a time is fatal to the relief sought. (*Id.*)

6. The board of police and excise of the city of Brooklyn cannot contest the rights of the treasurer of the Inebriates' Home of Kings county to that portion of the excise moneys collected by them under the amended charter of 1873 (*chap.* 863, *Laws of* 1873), which, by the act of 1872, in reference to said institution (*chap.* 687, *Laws of* 1872) is required to be paid to its treasurer; his right thereto being affirmed by said charter (*Sec.* 3). *People ex rel. Buckley* agt. *Board of Police, &c.*, 63 *N. Y. R.*, 623.)

7. Said board having received the money in a ministerial capacity, as public agents, have no discretion as to its disposal; they cannot refuse to pay it over to the institution for which they received it, and a writ of *mandamus* is proper to compel them so to do. (*Id.*)

MARINE COURT (NEW YORK CITY).

1. The marine court has jurisdiction of actions where the amount recovered does not exceed $2,000. It does not matter what is the amount claimed, if the sum finally recovered does not exceed $2,000, exclusive of costs. (*In re Barbour, ante*, 94.)

2. Under the provision of chapter 582 of 1870, relating to the marine court of the city of New York, the board of supervisors are authorized to fix the salaries of the officers and attendants of the said court, notwithstanding the prohibition against creating any new office or increasing the salaries of those then in office, contained in section 3 of chapter 382 of 1870. (*Wines* agt. *Mayor*, 9 *Hun*, 659.)

3. The question whether the attendants upon the courts of the city of New York are officers of the said court, or merely the servants thereof, considered. (*Id.*)

MARRIED WOMEN.

1. The defendant, a married woman, made her promissory note, in and by which she in express terms charged her separate estate. An action was brought (by service of summons for relief) to enforce the lien upon and payment of the amount thereof out of the defendant's property. Defendant did not appear, and on default plaintiff obtained an order of reference to compute the amount due, and upon the report of the referee judgment was entered, adjudging and directing that the defendant's property so charged and described in the complaint be sold by a referee therein named and that the defendant be barred of and from all equity of redemption in said premises, &c. The said premises were sold by such referee in pursuance of said judgment:

Held, that sections 274 and 287 of the Code provide the same remedy by judgment and execution against a married women, as the law affords against other persons, with the single qualification that the execution can be levied and collected only of her separate property.

That the statute having given a legal remedy which was adequate, there was no occasion for administering equitable relief.

That although formerly such a contract was treated as an appointment of, or charge upon the separate estate of a married woman, and the only remedy for its enforcement was by bill in equity, yet that mode of proceeding had been entirely superseded by section 7 of chapter 172 of the Laws of 1862, which enacted that "a married woman may be sued in any of the courts of this state, and whenever a judgment shall be recovered against a married woman, the same may be enforced *by execution* against her sole and separate estate *in the same manner as if she were sole.*"

That such enactments were *in pari materia* with the special statutes for the protection of married women, and should be so construed as to insure to them the same protection against the sacrifice of their property which the law gives to a *feme sole*, viz., levy, advertisement, right of redemption, &c.

That the more summary and expensive remedy pursued in this case, of foreclosing a lien or charge, and thereby cutting off the right of redemption, was in contravention thereof. (*Andrews* agt. *Monlaws*, 8 *Hun*, 65.)

2. A judgment, taken by default, giving greater relief than that demanded in the complaint, should be set aside. (*Id.*)

3. A married woman executed and delivered the following note:

"60.00. SYRACUSE, N. Y., *February* 26, 1875.

Six months after date I promise to pay to the order of Waggoner & Eager, sixty dollars at , value received, with use. And for value received, I hereby agree that the above sum shall be paid out of my separate estate, and make the same a charge thereon.

(Signed) HARRIET E. MILLINGTON."

Held, that the note was not avoided by filling in after the word "at," in a blank left for the place of payment, "State Bank of Syracuse, N. Y.," the leaving of such blank giving implied authority to the lawful holder to fill it up by designating a place of payment; that the body of the note contained a sufficient admission that the defendant was possessed of a separate estate.

That an allegation in the answer that the note was given for a prior indebtedness of her husband in his own business and for his own benefit, and that she was solicited to sign said note for her husband and did so without any intention of charging her separate estate or knowing that she had done so, following a general denial of each and every allegation in the complaint "except as hereinafter stated and admitted," had the sole legal effect to admit the making of the note, and the qualification of the admission was immaterial.

That such allegation constituted no defense to the note. (*Waggoner* agt. *Millington*, 8 *Hun*, 142.)

4. Under section 1 of chapter 90 of 1860, providing that the property of any married woman shall not be liable for the debts of her husband, "except such debts as may have been contracted for the support of herself or her children, by her as his agent," her estate is liable for the price of goods purchased by her as his agent, which were necessary for and used in the support of herself and her children. (*Covert* agt. *Hughes*, 8 *Hun*, 305.)

5. Where a married woman, who has a separate estate and carries on business in relation thereto, keeping a bank account in her own name, draws a check upon

such account payable at a future day on which she borrows money, the law presumes, in the absence of evidence to the contrary, that such money was borrowed for the benefit of her separate estate, and holds her liable therefor. (*Nash* agt. *Mitchell*, 8 *Hun*, 471.)

6. Where in an action brought against a husband and wife, upon a bond given by the wife, the caption of the complaint described him as "her husband," *held*, that this referred only to the time when the action was commenced, and did not amount to an allegation that she was a married woman at the time of giving the bond.

7. The complaint set forth a copy of the bond, in which she was described as the wife of the defendant James. *Held*, that this did not amount to an allegation that she was the wife of the defendant James, but merely that she executed a paper in which she was so described. (*Broome* agt. *Tuylor*, 9 *Hun*, 155.)

8. In this action, brought upon a promissory note given by the defendant, a married woman, it appeared that the same was given to secure a debt due from her husband, and also in consideration of certain personal property then transferred to her by the creditor. *Held*, that the plaintiff was entitled to recover the value of the articles of personal property acquired by the defendant. (*Spencer* agt. *Humiston*, 9 *Hun*, 71.)

9. To charge a wife for work done upon her premises, under a contract with her husband, there must be some evidence that he acted as agent and not as principal, and that his contract was for the wife, upon her credit and with her consent, with knowledge that her credit was pledged, and that she is understood to be the contracting party; his agency will not be assumed without any evidence. (*Jones* agt. *Walker*, 63 *N. Y. R.*, 612.)

10. A promissory note in the ordinary form, signed by a married woman, made payable to the order of her husband, and indorsed and presented for discount by him, is *prima facie*, a nullity; to give it vitality and effect it must be made to appear by evidence *aliunde* the instrument that it was made in her separate business or for the benefit of her separate estate. The fact that she owns separate estate is not alone sufficient to give it validity. (*Sec. Nat. Bank* agt. *Miller*, 63 *N. Y. R.*, 639.)

11. Accordingly, *held*, in an action upon two such notes against the maker, that a charge to the jury to the effect that the fact that defendant gave the notes to her husband with a view of having them discounted was calculated to convey the impression that she was the principal, and whatever was done was for her benefit, was error. (*Id.*)

MASTER AND SERVANT.

1. A boarding-house keeper is liable for the loss of his guest's goods, occasioned through the negligence of his own servants while they are acting within the scope of their employment. (*Smith* agt. *Read*, *ante*, 14.)

2. It is incumbent on a boarding-house keeper to exercise due and proper care of the baggage or property of his boarder — such care as a prudent person would take of his own property. (*Id.*)

3. It seems that the rule that a master is liable to third persons for the negligence of his servants while acting within the scope of their employment, is equally applicable to boarding-house keepers. (*Id.*)

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4. The defendant, a physician, attended a woman who died of small pox, and subsequently employed the plaintiff to whitewash the house in which the death occurred. The plaintiff, who knew that the woman had died of small pox, entered and whitewashed the house, relying upon the assurances of the defendant that the house had been thoroughly disinfected, and that he would be entirely safe in so doing. Plaintiff having contracted the disease in the house, subsequently brought this action to recover the damages sustained thereby. *Held*, (1) that the relation between the parties was that of master and servant; and, (2) that the plaintiff was entitled to rocover in case the jury should find, on all the facts, that the plaintiff did not act rashly and inexcusably in entering the house under the employment; and further, that the defendant had not conducted towards the plaintiff with due care and prudence. (*Span* agt. *Ely*, 8 *Hun*, 255.)

5. The liability of a master for injuries sustained by the servant in the course of his employment, considered. (*Id.*)

6. The defendant L. made a contract with the defendant S., by which the latter agreed to remove the earth and rock from a vacant lot of the former, which adjoined upon the west a lot belonging to the plaintiff, upon which was a brick stable. Subsequently the defendant S. sublet the contract to the defendant M., who proceeded so negligently and carelessly in the performance thereof as to injure the said stable. Such injury was not necessarily caused or produced by the performance of either of said contracts, but was due entirely to the negligence of the defendant M. and his workmen. In an action to recover damages for the injuries so occasioned, *held*, that the defendant M. alone was liable, and that the complaint was properly dismissed as to the other defendants. (*King* agt. *Livermore*, 9 *Hun*, 298.)

7. Where a servant enters upon employment from its nature necessarily hazardous, he assumes the usual risks and perils of the service, and also those risks which are apparent to ordinary observation. (*Gibson* agt. *E. R. Co.*, 63 *N. Y. R.*, 449.)

8. If he accepts service with knowledge of the character and position of structures, from which employes might be liable to receive injury, he cannot call upon his master to make alterations to secure greater safety, or in case of injury hold him liable. (*Id.*)

MECHANIC'S LIEN.

1. A copy of the notice of claim required by the mechanic's lien law to be filed in the county clerk's office, when certified by the deputy clerk, under the county seal, is entitled to be used in the same manner as if certified by the clerk himself. It is in effect the act of the clerk by his deputy. (*Jennings* agt. *Newman*, *ante*, 282.)

2. A copy of notice of mechanic's lien, in which the signatures are not proved or acknowledged, is not, though certified by the county clerk, admissible as evidence of the due filing of the proper notice of lien (*Following Sampson* agt. *The Buffalo, &c., Railway Co.*, 4 *N. Y. Sup. Ct. Repts.*, 600; *S. C.*, 2 *Hun*, 512). (*Id.*)

3. A judgment in the ordinary form of a judgment of a justice of the peace, in an action upon contract, is in legal effect a judgment establishing the lien as required by section 11 of the mechanic's lien law. (*Id.*)

4. Chapter 489, Laws of 1878, does not authorize the creation of a

lien as against the owner of the legal title to property, in regard to which there is an outstanding executory contract of sale with the vendee in, and entitled to the possession of the land, for materials and labor furnished to the vendee on a building contract made with him, or for his own benefit, unless such labor or supplies are furnished with the express consent of the owner of the fee of the land. (*Craig* agt. *Swinerton*, 8 *Hun*, 144.)

5. Where, at the time of serving a notice to foreclose a mechanic's lien, a bill of particulars was served, sworn by the claimant to be "in all respects true, to the best of his knowledge and belief." *Held*, that the verification was sufficient. (*Grey* agt. *Vorhis*, 8 *Hun*, 612.)

6. If, in an action brought to foreclose a mechanic's lien, the plaintiffs fail to serve with the notice the bill of particulars required by section 10 of chapter 452 of 1854, the remedy of the defendant is to move, before answering, to set aside the proceedings, or stay them until such service be made.

Such defect is waived by the service of an answer, and cannot be taken advantage of upon the trial. (*Norcott* agt. *First Baptist Church of Rome*, 8 *Hun*, 639.)

7. In March, 1878, the plaintiff entered into a contract with the owners of a hotel to furnish and put therein all the gas and water pipes and all wash-bowls, &c., that might be needed, and, in pursuance thereof, he commenced to furnish materials and perform work in March, and continued so to do until the contract was fully performed on his part on July nineteenth. On the first of May the property was conveyed to the defendant. On the seventh of August the plaintiff filed a mechanic's lien against the defendant. *Held*, that he was not entitled to a lien for so much of the materials and labor as were furnished and performed before the title was acquired by the defendant. *Held*, further, that the lien only extended to such materials as were furnished and to such labor as was performed within the sixty days, immediately preceding the filing of the notice of lien. (*See Tiley* agt. *Thousand Island Hotel Company*, 9 *Hun*, 424.)

8. Defendant contracted to sell certain premises in Brooklyn to D., with the condition that the latter should erect buildings thereon, defendant loaning him money for that purpose, and reserving the right to retain, from the advances agreed upon, the amount of any unsatisfied mechanic's lien. Plaintiff filed a mechanic's lien for work upon the buildings, done under a contract made with D. Defendant foreclosed the contract, sold the property and bid it in. In an action to foreclose the lien, *held*, that as defendant permitted the contract under which the work was done, he thereby, under the mechanic's lien law for the counties of Kings and Queens (*chap.* 478, *Laws of* 1862), subjected his lien for the purchase-money to plaintiff's lien, and upon the foreclosure took title subject to such lien. (*Hackett* agt. *Badeau*, 63 *N. Y. R.*, 476.)

9. A proceeding to foreclose a mechanic's lien under the mechanic's lien law, for the city of New York, of 1863 (*chap.* 500, *Laws of* 1863), is not an action within section 121 of the Code. (*Leavy* agt. *Gardner*, 63 *N. Y. R.*, 624.)

10. The proceeding abates upon the death of the defendant, and cannot be revived against his devisees or representatives. (*Id.*)

MISTAKE.

1. Where the foreman of a jury, by mistake, announces a verdict different from that agreed to by the

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jury, and the erroneous statement is taken and recorded, the court, upon application made at the same circuit immediately after the entry of the erroneous verdict, has power to correct the record so as to make the verdict conform to the actual finding. (*Dalrymple* agt. *Williams*, 63 *N. Y. R.*, 361.)

2. Affidavits of the jurors showing the mistake may be received upon such application (FOLGER, *J.*, *dissenting*). (*Id.*)

3. Money paid under a mistake of a material fact may be recovered back, although there was negligence on the part of the person making the payment, unless the position of the party receiving it has been changed in consequence thereof, and it would be inequitable to allow a recovery. (*Mayer* agt. *The Mayor*, 63 *N. Y. R.*, 455.)

4. If circumstances exist taking the case out of the general rule allowing a recovery, the burden of proving them rests upon the party resisting the repayment. (*Id.*)

5. Plaintiff, owning a lot in the city of New York, and intending to pay an assessment thereon for a local improvement, by mistake paid an assessment upon the lot of another. In an action to recover back the money so paid, *held*, that the city received the money collected in its own right, not as agent or depositary either for the land owners or the owners of the bonds issued to raise the money in the first instance to pay the expenses of the improvement; and that in the absence of evidence showing that the city could not be restored upon repayment to its original position, plaintiff was entitled to recover. (*Id.*)

MOTIONS AND ORDERS.

1. Application under section 243 of the Code to settle sheriff's fees on attachment may be made before the justice issuing the attachment while holding a special term at chambers. (*German American Bank* agt. *P. and E. Coal Co.*, 9 *Hun*, 205.)

2. An order of discontinuance, and that plaintiff pay defendant's costs when taxed, is valid and effectual from the time it is served, and plaintiff is not in default until defendant has procured his costs to be adjusted and demanded. When this is done the question as to the remedy of the party is one of practice, to be determined by the court below. (*People* agt. *Tweed*, 63 *N. Y. R.*, 202.)

3. The question as to the constitutionality of a statute upon which an action is based is a matter to be litigated upon the trial of the action, and will not be determined upon a special motion. (*Id.*)

4. An order denying a motion to open a default, and to set aside a judgment regularly entered thereon, because of *laches* on the part of the moving party, is not reviewable here. (*Wade* agt. *De Leyer*, 63 *N. Y. R.*, 318.)

5. Under the provisions of the Revised Statutes (2 *R. S.*, 199, *sec.* 153) prohibiting an action at law, unless authorized by the court, to recover a debt secured by a mortgage during the pendency of an action to foreclose the mortgage, or "after a decree tendered thereon," the court is not absolutely bound to grant an application for leave to commence an action to recover a deficiency arising upon a sale under a judgment in a foreclosure suit wherein no provision was made for a deficiency, but may, in the exercise of a sound discretion, grant or refuse it, in accordance with the equities of the case. (*E. L. Ins. Co.* agt. *Stevens*, 63 *N. Y. R.*, 341.)

6. *It seems*, that where the mortgagee has voluntarily refrained from

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asking a decree for any deficiency, some satisfactory reason should be assigned for permitting him to institute a separate action at law for its recovery. (*Id.*)

7. An action, the complaint wherein asks for the sale of mortgaged premises and the payment of the mortgage out of the proceeds, is an action "for the satisfaction of a mortgage," within the meaning of said statute (*sec.* 152). The mere omission to demand judgment for a deficiency does not convert it into a strict foreclosure. (*Id.*)

8. In an order of special term granting an application for leave to sue for a deficiency, it was stated that it was granted "solely on the ground that the court had no power or authority to deny the same." By the order of the general term this was "in all things affirmed." *Held*, that this was presumptively an affirmance, in all respects, of the decision of the special term, and in the absence of any thing in the case showing that the general term exercised its discretion and affirmed the order upon the merits, the question as to the power of the court was presented, and was reviewable here. (*Id.*)

9. An order refusing to send a case back to a referee to find in respect to a request to find made to him, is not error, when the circumstance, if found as requested, taken in connection with the other findings, would not change or materially affect the conclusion arrived at by the referee. (*Quincey* agt. *White*, 63 *N. Y. R.*, 370.)

MORTGAGE.

1. Where a mortgagor paid to the holder of the mortgage $100 in addition to the lawful interest to procure an extension of the time within which to pay the debt secured by the mortgage: *Held*, that the security given for the original debt was not impaired by such payment, but the amount so paid should be applied as a payment on the mortgage debt. (*Abrahams* agt. *Clausen*, *ante*, 241.)

2. By the payment of $100 besides the lawful interest the mortgagor secured an extension of the mortgage for three years. The bond accompanying the mortgage required the interest to be paid semi-annually. In an action to foreclose the mortgage for default in the payment of an installment of interest which became due November 1, 1875: *Held*, that the extension of the mortgage did not postpone or extend the time to pay the interest, the time for such payment remained unaltered, and the action for foreclosure was properly brought. (*Id.*)

3. Where a bond and mortgage, given by a father, were found by his children at his death, amongst his papers, the same having been in the father's possession for many years, and no claim having been made for either principal or interest for a period of ten years, the presumption is, that the mortgagor and his children were lawfully in possession of the bond and mortgage, and that the same are paid. (*Levy* agt. *Merrill*, *ante*, 360.)

4. An action may be maintained to have a bond and mortgage declared to be of no validity, although the land upon which the mortgage is claimed to be a lien has been sold by the heirs of the mortgagor, when a part of the consideration money, equal to the amount of the mortgage, has been retained and deposited in a trust company, to abide the event of an action to determine the validity of the bond and mortgage. (*Id.*)

5. *Townsend* agt. *Goelet* (11 *Abb. Pr.*, 187) distinguished. (*Id.*)

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6. Where G., on the application of L., agreed to advance moneys, and take an assignment of two valid mortgages made by L., and which mortgages were due and held by one T., the agreement being that L. should extend the payment of both mortgages, and should advance the further sum of $3,000, to be secured by a mortgage to be made by L., and that L. should pay to G. a bonus of ten per cent upon the moneys advanced for the accommodation and for the forbearance; the $3,000 mortgage being made, in part, to raise the funds with which the ten per cent bonus was to be paid, and which was actually paid thereout:
Held, that the two mortgages first above mentioned, of which an assignment was taken by G., the full amount of principal and interest thereon being paid to T., the holder, were valid securities in the hands of G. (*Langdon* agt. *Gray*, *ante*, 387.)

7. Also, that the $3,000 mortgage made to cover the ten per cent bonus was usurious and wholly void. (*Id.*)

8. And where, after the expiration of the year above named, a further bonus of ten per cent was exacted by G. and paid by L. for a further extension of a year, *held*, that the sum paid by way of bonus should be credited on the two mortgages first above mentioned. (*Id.*)

9. Where a chattel mortgage was made to secure, in part, a valid debt, and in part the payment of a note given upon an usurious agreement, *held*, that the chattel mortgage could only be enforced to the extent of the valid debt, and as to the residue it was void. (*Id.*)

10. When a party by deed assumes the payment of a mortgage, executed by his grantor, he becomes the principal debtor; the mortgagee may enforce the liability. (*Wales* agt. *Sherwood*, *ante*, 413.)

11. The plaintiff conveyed a lot to the defendant, subject to a mortgage, which the latter assumed and agreed to pay. In an action to foreclose the mortgage, to which the plaintiff, but not the defendant, was made a party, a judgment for deficiency was entered against and subsequently paid by the plaintiff. In an action brought by him to recover the amount so paid, *held*, that section 153 of 2 Revised Statutes (*Edm. ed.*), page 199, providing that no proceedings shall be had at law for the recovery of a debt secured by a mortgage after a decree has been entered in an action to foreclose the same, unless authorized by the court, did not apply to an action upon a covenant such as formed the subject of the present action. (*Comstock* agt. *Drohan*, 8 *Hun*, 373.)

12. The object of that provision was to limit a party attempting to enforce the collection of his debt by the foreclosure of a mortgage to that proceeding, unless good cause could be shown why resort should also be had to an action at law. (*Id.*)

13. Although the defendant was not a party to the foreclosure suit, the judgment recovered therein was competent evidence in this action to show the amount of the mortgage debt, the sale of the property, and the amount of the deficiency. (*Id.*)

14. It was not necessary for the plaintiff to give notice to the defendant of the pendency of the foreclosure suit. Where one person has become obligated to protect another against the consequence of his or her default in payment, a judgment regularly recovered against the party entitled to such protection is *prima facie* evidence of the facts established by it in his favor, in an action against the person

bound to make the indemnity. (*Id.*)

15. In this action, *held*, that the plaintiff was entitled to recover the amount of the judgment paid by him, and that the costs and expenses of the foreclosure suit should be deducted from the amount realized upon the sale of the property. (*Id.*)

16. In an action for the foreclosure of four bonds and mortgages executed by the defendant George W. Nelson, for a sale of the mortgaged premises and judgment for deficiency against him, and for a judgment against the defendant Ruea Nelson for any deficiency up to $20,000, on the ground of the execution by him of an instrument, by which he covenanted that on a sale under foreclosure of said mortgages, the mortgaged premises should yield a sum sufficient to pay the amount decreed, with the costs and expenses of sale, or in default thereof he would, on demand, pay any deficiency up to $20,000 which might result on such sale or sales, the defendant George W. Nelson set up usury as a defense, and the defendant Ruea Nelson also plead usury, and that the aforesaid instrument executed by him was procured to be so executed by fraud.

Held, that it was an equitable action purely, and it rested in the discretion of the court either to ask the aid of a jury to inform the conscience of a court, or to decide the case without such aid; that the defendant could not claim, as matter of right, to have the issues framed and tried at law. (*Knickerbocker Life Ins. Co.* agt. *Neilson*, 8 *Hun*, 21.)

17. No trust can be created and attached to an existing mortgage so as to make it a valid security for any greater amount than that specified in the body and upon the face thereof.

18. After the execution and delivery of a mortgage, but on the same occasion, and while the parties were still together, it was agreed between the mortgagor and the mortgagee that the latter should hold the mortgage until his debt was paid, and then assign it to the plaintiff, to be held by her as security for a debt owing to her by the mortgagor.

19. The debt of the mortagee having been paid, the mortgage was assigned to the plaintiff, who brought this action to foreclose it. *Held*, that the payment of the debt to the mortgagee extinguished his mortgage, and the assignment to the plaintiff was a nullity. (*Hubbell* agt. *Blakeslee*, 8 *Hun*, 603.)

20. In September, 1874, a mortgagor paid to the mortgagee $500 to procure an extension of the same for three years. The interest falling due November 1, 1875, remaining unpaid for twenty days, an action was brought, in pursuance of a condition therein, to foreclose the mortgage. The mortgagor insisted that the payment of $500 should be applied in payment of the interest falling due November one, and the action dismissed. *Held*, that the referee rightly refused so to do, and that a judgment should be entered for the amount appearing to be due on the mortgage, after deducting the $500, with interest thereon from the time of its payment. (*Church* agt. *Maloy*, 9 *Hun*, 148.)

MUNICIPAL CORPORATIONS.

1. The plaintiff was employed by the street commissioner of New York to perform certain services at a stipulated salary. He continued to perform such services from 1866 to 1872, when he was discharged. He was paid for his services, except the last three months of 1869; for these three months' salary this suit is brought.

It is claimed that the finance department, by chapter 227 of Laws of 1868, had the sole power of appointing the plaintiff.

Held, that it must be assumed from the fact that the plaintiff's employment was continued for so long a period, and that he was paid from month to month till October, 1869, that the finance department acquiesced in his appointment and treated it as valid, if not regularly made, and must be deemed equivalent to an actual employment by that department. (*Van Wart* agt. *Mayor*, *ante*, 78.)

2. An appropriation having been made at the beginning of the fiscal year in which this claim arose, out of which it could have been paid, the fact that this appropriation was exhausted is no defense to plaintiff's claim under a contract entered into with him at a time prior to its exhaustion. (*Id.*)

3. No right of action exists against the city of New York until the lapse of thirty days after the presentation of the demand to the comptroller, as required by the statute. Interest, therefore, can only be allowed on a demand against the city from the lapse of thirty days after its presentation to the comptroller. (*Id.*)

MUTUAL BENEFIT ASSOCIATION.

1. Companies or societies which are not sanctioned expressly by the legislature, pursuant to some special or general law, are nothing more than ordinary partnerships, and the laws respecting them are the same. (*Lafond* agt. *Deems*, *ante*, 41.)

2. While a partnership or association will not ordinarily be dissolved for mere defects of temper in some of the members of the copartnership, the evidence of violent and lasting dissensions is a ground upon which a court of equity will decree a dissolution. So, too, when the whole scheme is found to be visionary or founded upon erroneous principles. (*Id.*)

3. In such a case a receiver will be appointed for an adjustment of the accounts of the copartnership or association, and a decree of dissolution will be made. (*Id.*)

NATIONAL BANKS.

1. An attachment cannot be issued against a national bank or its property before final judgment in *any suit*, action or proceeding in *any state*, county or municipal court. (*Central National Bank* agt. *Richland National Bank of Mansfield*, *ante*, 186.)

2. The issuing of an attachment against these institutions or their property is strictly prohibited by congress, and it is only where jurisdiction cannot be acquired without resort to attachment that the power of congress to inhibit, or rather to postpone, the use until final judgment of such provisional remedy, seems to be at all questionable. (*Id.*)

3. This prohibition does not in any manner interfere with the general *jurisdiction* of the state courts over national banks. It does not take away the jurisdiction over such foreign corporations having property within this state. That jurisdiction is not acquired by virtue of the provisions of the Code of Procedure relating to this particular provisional remedy; the jurisdiction is acquired by the service of the summons, and that is effected under the provisions of section 134 of the Code; or where personal service cannot be had upon an officer, then it may be had by publication under the provisions of section 135. (*Id.*)

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NEGLIGENCE.

1. A railroad company is bound to keep its track in good order and repair, and if it carelessly or negligently fails or omits to do so, and an injury occurs in consequence thereof, it will be liable in damages. (*Conroy* agt. *Twenty-third Street R. R. Co.*, *ante*, 49.)

2. It is equally incumbent upon them to keep those parts of its road proximately connected with its track in good order and repair, and they are negligent if they omit to have such repairs made, not only to their track, but to contiguous portions of their road, as will keep it in good condition, and make it safe for those who have a right to drive across it. (*Id.*)

3. To entitle a party to recover in an action for negligence, it must appear that there was no negligence on his part which contributed to the injury. (*Id.*)

4. Contributory negligence is a question for a jury to decide, and where the court, as in this case, instructs the jury that, if the driver of the horse, by the want of proper observation, attention or circumspection, under the circumstances contributed in any sensible degree to the accident, the defendant would not be liable; the instruction is a correct and proper one. (*Id.*)

See MASTER AND SERVANT.
Smith agt. *Read*, *ante*, 407.

5. An administratrix kept a large amount of money (the collections from the sales of goods in a store and of notes and accounts of the intestate) in a trunk in a bedroom occupied by her crippled son, being one of the rooms occupied by her family adjoining the store. Part of such collections had been kept there over a year. The nearest bank was twelve miles from where she lived. The money was stolen. *Held*, that had the money been only a portion of the estate lately collected, and had the rest been deposited in bank, she might have been held authorized to keep the same where she did, until a proper opportunity to deposit it in the bank occurred; but as the whole, or nearly all, the fund had been allowed to remain in such an insecure place for nearly a year, when it was finally stolen, it was such a violation of the ordinary laws of prudence as constituted negligence for which she was liable. (*Cornwell* agt. *Deck*, 8 *Hun*, 122.)

6. Where a passenger upon a street car in the city of New York, being unable to obtain a seat in the interior of the car, remains standing on the platform thereof, he is not guilty of such contributory negligence as prevents him from recovering damages from injuries sustained by him, in being thrown from the car in consequence of the negligence of the driver thereof.

7. By his fall from the car the arm of the deceased was broken above the elbow, the broken fragments of the bone protruding through the skin and resulting in the development of a poisonous discharge, which, being absorbed by the blood, caused his death. *Held*, that the wrongful act of the defendant in occasioning the wound was the cause of his death within the meaning of the statute, and that the defendant was liable for the damages occasioned thereby. (*Ginna* agt. *Second Avenue R. R. Co.*, 8 *Hun*, 494.)

8. Where premises are effected by a nuisance at the time of their demise, the owner is liable for any injury occasioned by it to a third person, even though the negligence of the tenant contributed thereto. (*Walsh* agt. *Mead*, 8 *Hun*, 387.)

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NEW TRIAL.

1. A motion for a new trial under section 268 of the Code is only allowable where the decision filed under section 267 *does not authorize a final judgment.* (*Produce Bank* agt. *Morton*, *ante*, 157.)

2. Where the amount of plaintiff's claim was ascertained, judgment was rendered that the assignment be set aside, that the assignee deliver over the assigned property to a receiver, and that the plaintiff be paid out of the proceeds the amount of his claim and costs:
Held, that the judgment was final and reviewable by appeal; that the machinery of a reference and receivership was for the sole purpose of carrying the judgment into execution, and not the foundation of any further judicial action in the case. (*Id.*)

3. An appeal from an order granting a new trial cannot be had to the court of appeals where the amount of the judgment or subject-matter in controversy does not exceed $500 (*Laws of* 1874, *p.* 378). (*Id.*)

4. *It seems* that the amount of the judgment when entered must govern the question of appealability, and that interest accruing after its rendition cannot be added for the purpose of bringing it up to the requisite amount. Where judgment has been rendered for a specific amount, that must be the test. Where there is no judgment, or it is not for a specific sum, the value of the subject-matter in controversy must be ascertained. (*Id.*)

5. To furnish adequate ground for a new trial, on the ground of "after discovered evidence," the same must have been discovered since the trial, and have been out of the parties' power, by diligence, to have been discovered before. (*Hatfield* agt. *Macy*, *ante*, 193.)

6. The want of recollection of a fact, which by due diligence and attention the party might have remembered, is not ground for a new trial. (*Id.*)

7. In order to the granting of a new trial on the ground of *surprise*, the material point, in respect to which the surprise is alleged, must have been of a nature that it could not have been anticipated, and there must have been no want of skill, care or attention. (*Id.*)

8. To furnish proper and sufficient ground for a new trial on the ground of *newly-discovered evidence*, the same must have been discovered since the trial, and must be shown to have been out of the parties' power by diligence to have been discovered before. (*Gautier* agt. *Douglas Manufacturing Co.*, *ante*, 325.)

9. It is only in a case of indispensable necessity that a party will be relieved by the granting of a new trial. (*Id.*)

10. A motion for a new trial should be denied where it appears that the newly discovered evidence is partially cumulative, and where most of the witnesses by whom it is alleged that the newly discovered evidence will be given were examined upon the trial, and being in the employ of the defendants could have been examined, if due diligence had been used, and by a proper examination or cross-examination of those witnesses the facts now sought to be established could have been elicited. (*Id.*)

11. Where a question asked a witness on the trial was excluded by the court as incompetent, and an exception thereto was taken, a new trial should not be granted to enable other witnesses to testify to the same matter. The ruling of the court in excluding the evi-

dence should be passed upon by the general term on appeal. (*Id.*)

12. A new trial will not be granted where the alleged "newly discovered evidence" is material only to impeach or *contradict* witnesses sworn on the former trial. (*Id.*)

13. Motions for a new trial are addressed to the sound discretion of the tribunal before which they are heard, and if the moving party is overborne by the affidavits of his adversary, the court ought not, in the absence of evidence impeaching the character of the parties making such affidavits for truth and veracity, to disturb a judgment after hearing at special term. (*Id.*)

14. A refusal of the court to postpone the trial on account of the illness of a party to whom the defendants allege the management of the trial was intrusted, is a matter in the discretion of the justice who tried the cause, and should not be interfered with by another justice sitting at the same branch of the court, except where the discretionary power has been abused or most unwisely exercised; especially where the trial was by the court without a jury, in which case, under section 268 of the Code, an appeal lies directly to the general term. (*Id.*)

15. A new trial will not be granted to enable a plaintiff to recover nominal damages, the verdict on the former trial having been for the defendant. (*Nolan* agt. *Harris*, *ante*, 409.)

When not granted — on account of insufficiency of damages. (*See Wavle* agt. *Wavle*, 9 *Hun*, 125.)

Granted — on account of admission of improper evidence, on trial at law, although result may not be changed by it. (*See Hawley* agt. *Hatter*, 9 *Hun*, 184.)

16. A denial of a motion for a new trial, made upon the judge's minutes, is not the subject of an exception, and such an exception presents no question of fact for review upon appeal from the judgment. (*Matthews* agt. *Meyberg*, 63 *N. Y. R.*, 656.)

17. To bring up the case for review upon the facts there must be an appeal from the order denying the motion for a new trial. (*Id.*)

NONSUIT.

1. Whether, when a nonsuit or a verdict is directed at the circuit, the party excepting thereto should not ask that the case be submitted to the jury, if he desires to insist upon appeal, that the court erred in not making that disposition of the case. (*Bowe* agt. *Gano*, 9 *Hun*, 6.)

NOTICE.

Of mechanic's lien, under chapter 489 of 1873 — only extends to such labor as is performed and such materials as are furnished within the sixty days immediately preceding the filing thereof. (*See Tiley* agt. *Thousand Island Hotel Co.*, 9 *Hun*, 424.)

Of claim — under section 216 of the Code — where coroners provide an office and have there a person who is intrusted with the entire charge of the office business, and of the service of process, a delivery to him of a notice of claim to personal property, and of the affidavit required by section 216 of the Code, is legally a delivery thereof to them. (*See Manning* agt. *Keenan*, 9 *Hun*, 686.)

NUISANCE.

1. The business of cutting and polishing marble by machinery or otherwise is not *per se* a nuisance,

and an injunction will not lie at the suit of an adjoining house-owner to restrain a party from the continuance of such business. *Butterfield* agt. *Klaber*, *ante*, 255.)

2. Noises are not *ex necessitate* nuisances, even when disagreeable; and it is only when they are of a character so objectionable as fairly to come within the meaning of that significant term that a court of equity will interfere to repress or restrain them. (*Id.*)

3. Noise, to constitute a nuisance, must be *unusual, ill-timed or deafening*. (*Id.*)

4. *It seems* that the use of a *steam whistle*, which is unnecessary to the successful prosecution of a business, may be designated as a *nuisance*, and its use may be restrained by injunction. (*Id.*)

5. The proper rule, in cases like the present, would *seem* to be: That, in the enjoyment of his own land, one must be confined to such reasonable use thereof as will not inflict injury on his neighbor or interfere with his neighbor's reasonable enjoyment, and must submit to such inconveniences as necessarily result from the reasonable use and enjoyment by his neighbor of land belonging to him. (*Id.*)

ORDER.

If a party who is entitled to enter an order fails to do so for twenty-four hours after the decision has been made, any party interested may have it drawn up and entered. (*See Matter of Rhinebeck and Conn. R. R. Co.*, 8 *Hun*, 34.)

PARTIES.

1. To an action brought by a stockholder against the president, trustees or directors of a corporation for an alleged conversion or misappropriation by them of corporate property, the corporation itself is a necessary party (*Affirming S. C.*, 49 *How.*, 79). (*Greaves* agt. *Gouge*, *ante*, 58.)

2. Since the act of 1872 (*Laws of* 1872, *chap.* 161), which gives to a resident and tax-payer the right to bring an action *to prevent* waste or injury to any property, fund or estate of such county, town or municipal corporation, such resident tax-payer has also a remedy by injunction against officers of a municipal corporation who are proceeding under an act authorized by statute, which statute is repugnant to any constitutional provision restraining them from doing the wrongful act. (*Hurlburt* agt. *Banks*, *ante*, 196.)

3. Although the act of 1872 allows an action to be brought against officers of a municipal corporation who are about to do wrongful acts, it has not repealed other statutes, nor declared that they are the only necessary parties to such action. (*Id.*)

4. This action is brought by the plaintiffs, as residents and tax-payers of the city of Albany, against the defendants, the mayor, the chamberlain and the clerk of the common council of the city of Albany, to restrain them from issuing bonds of the city of Albany to the amount of $185,000, pursuant to the provisions of chapter 445 of the Laws of 1876, which provides for the improvement and ornamentation of certain roads and avenues leading to Washington park:

Held, that there is a defect of parties; that a proper adjudication and determination of the rights of all interested in the subject-matter of this action, require the city of Albany and the board of park commissioners should be made defendants, and the injunc-

tion asked for should therefore be refused. (*Id.*)

5. The plaintiff, who is a stockholder in one of the corporations, sues on behalf of himself and of such other stockholders as shall elect to join in the action, joining both corporations as defendants. *Held*, that the action is properly brought. (*Watson* agt. *Harlem and N. Y. Navigation Co.*, *ante*, 348.)

6. An objection that there is a defect of parties, must be taken either by demurrer or answer, or it will be deemed to have been waived. (*Patterson* agt. *Copeland*, *ante*, 460.)

7. In an action against executors for a specific performance of a contract, entered into by the testator, persons claiming through such testator are not necessary parties. The decree against the executors to make the conveyance would bind all parties claiming through the latter. (*Id.*)

8. Where a policy of insurance by its terms makes the loss payable to a mortgagee named, of the property insured, he may maintain an action in his own name for such loss. (*Roussel* agt. *St. Nicholas Ins. Co.*, *ante*, 495.)

9. In such case it is not necessary to join those who were in actual possession of the property at the time of such insurance, and in whose name the policy was obtained, although they were the owners of the property subject to the interest of the mortgagee. (*Id.*)

10. A mortgagee of property has an insurable interest in it, and where the complaint expressly avers such interest to have existed at the time of effecting the insurance, the legal presumption is that such interest continued until the time of the loss. It is unnecessary to aver in the complaint the existence of an insurable interest at the time of the loss, as what is necessarily implied need not be in terms alleged. (*Id.*)

11. The misuse of a word which is manifestly a mere orthographical error, by which the party has not been misled, does not render pleadings demurable. Such mistakes may be corrected at any time, and should be disregarded. (*Id.*)

See RESCISSION OF CONTRACT.
Anthony agt. *Day*, *ante*, 35.

12. Where the assignee in bankruptcy is not made a party to an action affecting property fraudulently conveyed by the bankrupt prior to the bankruptcy proceedings, the defendants must set up the defect of parties in their answer, otherwise the right to object on that ground is waived. (*Dewey* agt. *Moyer*, 9 *Hun*, 473.)

13. Where a person brings a legal action, he cannot be compelled to sue any person except such as he may elect to sue. A defendant cannot convert such action into an equitable one by interposing an equitable defense. Such defense must stand, and be tried on its merits as a mere naked defense. Section 122 of the Code, authorizing the bringing in of additional parties, only applies to equitable actions. (*Webster* agt. *Bond*, 9 *Hun*, 437.)

14. One who has the control of property, either as owner, consignee or agent, may effect an insurance thereon in his own name, on account of whom it may concern, loss payable to him; and in case of loss may maintain an action thereon. (*Sturm* agt. *A. M. Ins. Co.*, 63 *N. Y. R.*, 77.)

15. An action to foreclose a lien for the purchase-money under a contract for the sale of land, cannot be maintained by the representa-

tives of a deceased vendor where it is not alleged or shown that they have tendered, or are willing, ready and able to give a deed; at least unless the person taking the legal title to the premises, either as heir or devisee, is made a party so as to be bound by the judgment. (*Thomson* agt. *Smith*, 63 *N. Y. R.*, 301.)

16. An action cannot be maintained by an individual, either as corporator or tax-payer, to determine the legality of the election of one claiming to hold a municipal office, or to restrain the exercise of unauthorized powers by the officers of a municipal corporation, or to restrain or avoid the illegal acts of the corporation, unless plaintiff is thereby affected in his private rights as distinct from that of other corporators and tax-payers. The remedy in these cases is by action or appropriate proceedings in the name of the people of the State. (*Demarest* agt. *Wickham*, 63 *N. Y. R.*, 320.)

17. So, also, no private remedy is available to an individual to compel a municipal officer to cause an election to be held to fill a vacancy. If the power exists, and it is the duty of the officer to exercise it, he may be compelled so to do by writ of mandamus, sued out by or on behalf of the State. (*Id.*)

18. An agent who, in pursuance of instructions of principal, sends money to him by express, cannot maintain action against carrier to recover it back. (*Id.*)

19. Action cannot be maintained by manufacturing corporation against its trustees for declaring unlawful dividend. (*Id.*)

PARTITION.

1. In order to enable a party to maintain an action for the partition of lands, he must not only have an estate in the premises, as a joint tenant, or tenant in common, but he must be in the actual or constructive possession of his individual share or interest. (*Thorasson* agt. *White*, *ante*, 62.)

2. Where the premises are held adversely, the party out of possession cannot try the question of title in this form of action. It is a question for the determination of a jury. (*Id.*)

3. In case of a compulsory partition between tenants in common, and the failure of title to a portion of the land partitioned by a defect in the common title, and eviction from such portion, the party so evicted has a right to be compensated for the loss occasioned by the eviction out of the other lands, and perhaps, in case of a failure of the other lands, by reason of alienation by the copartitioners, leaving the remaining partitioned lands insufficient, to a pecuniary compensation from the proceeds of the alienated lands, which may result in a personal decree. (*Marvin* agt. *Marvin*, *ante*, 97.)

4. *It seems* that in a case where the partition was recent, and no change had occurred by which the value of the lands partitioned was materially affected, and there was no other claims or equities between the parties which ought to be examined or adjusted, the proper remedy might be by a motion to set aside the judgment in partition, and to have a new partition restoring equality of partition, in view of the new facts. (*Id.*)

5. A final judgment in partition is not more exempt from the interference and controlling of courts of equity than are final judgments and decrees in other cases. Hence, such a mistake of facts, or such an accident as would authorize a court of equity, in enjoining or setting aside an ordinary judg-

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ment, would justify setting aside or correcting a judgment or decree in partition. And, in a proper case, where no extrinsic circumstances were to be considered, a remedy by motion might be adopted. (*Id.*)

6. But where the judgment in partition was entered more than ten years ago, and the parties then entered into the possession and the pernancy of the rents, issues and profits of the various premises to them respectively set off in severalty, the partition involving many distinct parcels, differently situated and of different values, and many parcels of the land divided were subject to known incumbrances, the partition being a long and intricate proceeding, and involving, to a great extent, the judgment and discretion of the commissioners, one of whom has since died, and it is claimed by the copartitioner, though denied by the plaintiff, that all the land which was set off to him has passed beyond his possession or control by foreclosures of previous incumbrances and by various alienations:

Held, that these facts afford a sufficient reason for denying summary relief by a motion in the original partition suit, and show that the various questions likely to arise should be presented and passed upon in a more formal manner, especially where the rights of third parties appear to have intervened, and their titles are to be brought in question. (*Id.*)

7. *It seems* that the proper remedy in such case is by a new action, in the nature of a bill of review, and, in such a suit, the further alienation of the property partitioned to the copartitioner might, if necessary, be restrained by a notice of *lis pendens*, or an injunction order, and after examining and disposing of all questions, whether of fact or law, bearing upon the equitable rights of the parties, a decree might be made for a repartition, if the situation of the premises should be such as to render that course practicable without injustice; if not, then such other equitable relief might be given as the situation of the parties and property might seem to require. (*Id.*)

8. Before the statute (*Laws of* 1852, *chap.* 277) was enacted, an infant could not maintain an action for partition at all; under it, whether the infant sue alone or be joined as co-plaintiff with other parties in interest, the conditions of the statute must be strictly complied with, upon which the privilege of maintaining the suit is accorded to the infant. (*Struppman* agt. *Muller*, *ante*, 211.)

9. It is irregular to institute proceedings in partition on behalf of an infant, without first obtaining the authority of the court. (*Id.*)

10. The mere joinder with such infant of a tenant in common, as co-plaintiff, will not dispense with the necessity, on the part of the infant, of obtaining the authority to sue, which, under the statute, is a condition precedent to the maintenance of the action; or authorize a decree of sale, except under the conditions which the statute imposes. (*Id.*)

11. Partition will not be ordered upon the application of an infant, unless it be made satisfactorily to appear that the interests of the infant require such partition or sale. (*Id.*)

12. An action of *partition* cannot be prosecuted by or in behalf of *an infant*, as plaintiff, without the appointment by the court of a *next friend*, pursuant to the act of 1852. (*Id.*)

13. It is erroneous to allow an infant, in proceedings in partition, to act by guardian without security. (*Id.*)

14. Persons having adverse or conflicting rights in relation to the subject-matter of a litigation ought never to be joined as complainants. (*Id.*)

15. *It seems* doubtful whether a person claiming interests in the property adverse to that of the infant, such as a right during his life to the rents and profits of land to which they are entitled in remainder, or an interest in the enforcement of an equitable lien upon that land, may join them as co-plaintiffs with himself in a suit to enforce his own right and remedies in *these* respects, and as their guardian *ad litem*, may prosecute such suit, in his own behalf, to a decree in his own favor, impairing or divesting them of their title for the purpose of establishing his own. (*Id.*)

16. Where the rights and interests of infants are involved, purchasers at judicial sales will be discharged from their purchases, where reasonable doubt exists as to the validity of the title thereby acquired. (*Id.*)

17. Where a vessel is owned, in unequal proportions, by several persons, who cannot agree upon the sale or for the working of it, the supreme court of this state has jurisdiction over an action brought by one owner to procure the appointment of a receiver, the sale of the vessel, and the division of the proceeds among the owners thereof. (*Andrews* agt. *Betts*, 8 *Hun*, 822.)

18. *Semble*, that the admiralty courts do not exercise jurisdiction to order the sale of a vessel owned by tenants in common, except in those cases in which the opposing interests are equal. (*Id.*)

PARTNERS.

1. Although the partnership relation may exist between parties, the court has jurisdiction to entertain a suit at law, brought by one against only one of the several other partners for damages, where the action involves an inquiry only with respect to the damages which the plaintiff has sustained, solely because of an alleged breach of the partnership agreement by the defendant. (*Wills* agt. *Simmonds*, 8 *Hun*, 189.)

2. Where the particular controversy can be completely determined without prejudice to the rights of the parties not made defendants, they are not necessary parties thereto. (*Id.*)

3. Where parties who were bound by an agreement to accept certain bills of exchange to pay for goods purchased, declare in advance that they will not do so, such declaration of their intention not to perform their contract, is a breach thereof, and upon the occurrence of the breach a cause of action exists at once against them, whether the goods were at hand and delivered or to arrive, the damages therefor depending upon the facts to be established upon the trial. (*Id.*)

4. In an action by the administratrix of A. against the administratrix of B. for an accounting in respect to a partnership existing between A., B. and C., alleging that after the death of A. the partnership was continued by B. and C., as surviving partners, for a short period, when B. purchased the interest of C. with partnership effects, and thereafter continued the business as sole surviving partner until his death; and that after the death of B., his widow and administratrix the defendant (who had since married one Collier) carried on the same business with the partnership capital and effects, and that no accounting of the interests of A. had ever been rendered to the plaintiff, who was his widow and administratrix; that the other de-

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fendants were the children of B. and made defendants on the ground of a partial distribution of their father's estate to them; and that some of the real estate which descended to them, as heirs of their father, was in fact purchased with the funds of the partnership aforesaid, and so constituted a part of the assets thereof; on demurrer to the complaint by the defendant Collier, administratrix, interposed on the ground that the facts stated in the first cause of action did not constitute a cause of action against her, and that several causes of action had been improperly united in the complaint:

Held, that the facts stated made out a case within the equitable jurisdiction of the court.

That a surviving partner, though he has a legal right to the partnership effects, yet, in equity, is considered a trustee to pay the debts and dispose of the effects for the benefit of himself, and the estate of his deceased partner.

That the capital of the deceased partner is to be treated as trust property; and when it has been employed in carrying on the business of the concern, so much of the subsequent profits as can be attributed to the employment of such capital must be accounted for by those who have used it; and on this principle the defendant Collier was liable, as administratrix, to account for the *quasi* breach of trust of B., her intestate, and hence a cause of action was correctly stated against her.

That there was really but one cause of action set out in the complaint, namely, the right to an accounting concerning the affairs of the partnership mentioned; and no distinct cause of action set forth against the defendants other than Collier, the administratrix; but in such an action it was proper to make all persons parties who were interested in the subject-matter of the accounting, although the interests of the several defendants did not accrue in the same right. (*Skidmore* agt. *Collier*, 8 *Hun*, 50.)

PAYMENTS.

1. Although payment made within six years, on a note given on a balance due for the purchase of goods under fraudulent representations will keep alive the note, they will not the right of action for the fraud which would be barred by the statute of limitations. (*Fritts* agt. *Slade*, 9 *Hun*, 145.)

POLICE COMMISSIONERS (NEW YORK).

1. Upon a common-law certiorari the supreme court is not restricted to the jurisdiction of the inferior tribunal over the parties and the subject-matter, but it is the duty of the court in addition thereto to examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether in making it any rule of law affecting the rights of the parties has been violated. (*People ex rel. Miller* agt. *Board of Police Commissioners*, *ante*, 289.)

2. A member of the police force of the city of New York can only be removed by the board of commissioners after written charges have been preferred against him, and after the charges have been publicly examined into, upon reasonable notice to him, and in such manner as the rules and regulations of the board of police may prescribe. (*Id.*)

3. On the 5th of February, 1875, notice of the charge, together with a copy of the charge and specification, was served upon the relator, which notice stated that the trial would take place at the office of the board of police on the 10th

day of February, 1875. The relator admitted due personal service of the charge, specification and notice of trial, and he also signed the following admission: "I hereby admit the within charge as specified, and waive trial thereon." On the eighth day of February, two days before the trial, the relator delivered to the commissioners a sworn statement, denying his guilt, recanting and withdrawing the admission previously made, revoking the waiver of trial, denying and fully answering the charges, and fully explaining the reason why, and the circumstances under which the admission was made.

Held, that the board of commissioners were guilty of error in refusing to consider the explanatory affidavits submitted by the relator, and in removing him from his office on the strength of an admission which he never intended to make, and which he withdrew before the day appointed for the trial and examination of his case. There was no trial or examination, and the dismissal was illegal. (*Id.*)

POSSESSION.

1. Although, as a general rule, *trespass quare clausum fregit* can only be maintained by one in actual possession of the premises when the injury is committed, yet in the case of a disseisin the disseisee, after he has regained possession, may maintain his action against the disseisor for acts intermediate the disseisin and re-entry. (*Haley* agt. *Wheeler*, 8 *Hun*, 569.)

PLACE OF TRIAL.

1. Of action against public officer, for acts done *virtute officii*, must be brought, so far as he is concerned, in the county where the cause of action, or some part thereof, arose. (*People* agt. *Kingsley*, 8 *Hun*, 233.)

PLEADINGS.

1. An account stated or settled is a mere admission that the account is correct; it is not an estoppel. The account is still open to impeachment for mistakes or errors. Its effect is to establish *prima facie* the accuracy of the items without proof, *and the party seeking to impeach it is bound to show affirmatively the mistake or error alleged.* (*Barker* agt. *Hoff*, *ante*, 382.)

2. Where a plaintiff desires or intends to impeach an *account stated* for error or mistake, he must allege the existence of such error or mistake in his pleadings. (*Id.*)

3. The rule is that where, upon a general bill for an account, the defendant sets up a stated account in bar, the complainant will not be permitted to show mistakes or errors in such account, but must amend his bill, as the settled account is *prima facie* a bar to the suit until specific errors are assigned. (*Id.*)

4. Where the reply of the plaintiff alleged no error in the account, except that it was not a full account and was made for the specific purpose of inducing Townsend to act as trustee:

   Held, that the reply does not contain such allegations as to bring the plaintiff within the rule; and he having failed to establish that the account was made for the purpose alleged in the reply, is not in a position to attack the account as erroneous. (*Id.*)

5. A complaint alleged that the defendant, by J. S. McClure, made and delivered her promissory note, in writing, setting forth a copy of the note, signed J. S. McClure, agent, and alleging that the consideration of the note was goods sold to the defendant. *Held*, that the complaint stated facts sufficient to constitute a cause of action. That, under the allegation

that the defendant made and delivered her promissory note, it would be competent to show that the person signing the note was duly authorized by her so to do. (*Moore* agt. *McClure*, 8 *Hun*, 557.)

6. A complaint alleged a partnership between plaintiff and defendant; its dissolution; an accounting; a certain sum found due plaintiff; a demand therefore and refusal to pay, and asked judgment for the amount. *Held*, not to be demurrable, although no promise to pay the amount was alleged. (*Mackey* agt. *Auer*, 8 *Hun*, 180.)

7. It is not sufficient to show that the relief upon certain facts could not be that subsequently asked for by the complaint; it must be shown that upon the facts alleged, the plaintiff would not be entitled to any relief at the hands of the court, for the legal and equitable powers of the court are not necessarily controlled by the prayer for relief which the plaintiff adopts, although the relief, where no answer is interposed, cannot go beyond such prayer. (*Id.*)

8. A cause of action in the Code means any cause of action. (*Id.*)

9. When the assignee in bankruptcy is not made a party to an action affecting property fraudulently conveyed by the bankrupt prior to the bankruptcy proceedings, the defendants must set up the defect of parties in their answer, otherwise the right to object on that ground is waived. (*Dewey* agt. *Moyer*, 9 *Hun*, 473.)

Words, "her husband" in caption of complaint — held to relate to the time when the action commenced, and not to the time when the instrument sued on was given. (*See Broome* agt. *Taylor*, 9 *Hun*, 155.)

10. A complaint in an action against a husband and wife upon a bond set forth a copy of the bond, in which she was described as the wife of the defendant James. *Held*, that this did not amount to an allegation that she was the wife of the defendant James, but merely that she executed a paper in which she was so described. (*Id.*)

Plea in abatement — sufficiency of — answer not required to contain prayer for particular relief — any objection to answer should be presented by a demurrer, and is waived by going to trial upon the issue of fact. (*See Dawley* agt. *Brown*, 9 *Hun*, 461.)

11. Amendment — right of referee to allow it, so as to convert an action for use and occupation by one cotenant, into an action for an account under 1 Revised Statutes, 750, section 9. (*Joslyn* agt. *Joslyn*, 9 *Hun*, 888.)

12. The complaint in an action under the statute (*chap.* 49, *Laws of* 1875), to recover moneys fraudulently obtained from a municipal corporation alleged, in substance, that defendant T., who was one of a board of audit, unlawfully conspired with others to procure false and fictitious claims, to be set up, allowed and paid; that in pursuance thereof such claims were certified to by the members of the board as audited and allowed, in apparent compliance with the statute, when in fact they were not examined or audited; upon such certificates they were paid. *Held*, that the complaint stated but one cause of action, *i. e.*, the fraudulently obtaining the money, the allegations as to the neglect of duty being statements simply of a step in the conspiracy by means of which the fraud was accomplished. (*People* agt. *Tweed*, 63 *N. Y. R.*, 194.)

13. The complaint set forth in one count different acts of fraud, in obtaining payment of many different fraudulent claims at different times. *Held*, that the complaint

did not state separate and distinct causes of action, which, under section 167 of the Code, are required to be separately stated, but that the whole might be treated as a single cause of action. (*Id.*)

14. The municipal corporation having been made a party defendant, *held*, that it was not necessary to set forth in the complaint specifically its interest in the cause of action. (*Id.*)

15. In such an action defendants set up as a counter-claim an account without giving the items; plaintiffs demanded a copy of the items. Before this was served, defendants served an offer to allow judgment against them for a specified sum, and for a foreclosure and sale. Plaintiffs obtained the ordinary judgment of foreclosure and sale, with a personal judgment for any deficiency. The amount found due was less than the offer, the counter-claim having been allowed. It was urged by plaintiff that the judgment obtained was more favorable; first, because of the personal judgment for a deficiency; second, because the counter-claim was extinguished, and until a copy of items of the account was served the counter-claim was inchoate (*Code, sec.* 158), and could not be considered as embraced in the offer. *Held*, untenable, as the offer allowed a personal judgment for the full amount, and thus covered any possible deficiency, and as the answer sufficiently apprised plaintiffs of the nature of the counter-claim. (*Bathgate* agt. *Haskin*, 63 *N. Y. R.*, 261.)

16. No suits can be brought against heirs at law or devisees within three years from the time of granting letters testamentary or of administration. (*Selover* agt. *Coe*, 63 *N. Y. R.*, 438.)

17. This objection is not waived by not being pleaded. The plaintiff, to maintain such an action, must show affirmatively that his case is within the provisions of the statute, and as a material part of his affirmative case he must show that the action is brought after three years. The provisions of the Code requiring certain objections to be taken by answer or demurrer are not applicable (*Secs.* 74, 148). (*Id.*)

18. In an action to restrain the execution of a lease by defendant's trustees upon sale for an unpaid assessment, the complaint, after alleging a sale under an illegal assessment, set forth that by defendant's charter (*chap.* 678, *Laws of* 1868), leases given to purchasers upon sale for unpaid assessments are declared to be presumptive evidence that the assessments were legally imposed and the proceedings and sale regular. By the charter assessments are made a lien upon the premises, the owner is given one year in which to redeem, and the purchaser is not entitled to a lease until he has given at least sixty days' notice. The complaint did not allege that any steps had been taken by the trustees or the purchaser since the sale, or that the purchaser claims a lease, or that the trustees threaten or design to give one, or that the assessment is regular upon its face, or that there is any record making it *prima facie* regular. *Held*, that the facts stated did not entitle plaintiff to the relief sought; and that a demurrer to the complaint was properly sustained. (*Sanders* agt. *Village of Yonkers*, 63 *N. Y. R.*, 489.)

19. Also, *held*, that there was a defect of parties in the omission to make the purchaser a party defendant; and that the defect appeared upon the face of the complaint; that an allegation that the purchaser was living was not necessary, as it would be inferred from that portion of the prayer for relief asking

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that defendant be enjoined from executing a lease to the purchaser.

PRACTICE.

1. An order of arrest, granted by one of the justices of Erie county, was directed to the sheriff of said county, requiring him to arrest the defendant and hold him to bail in a sum specified, and to return the order to plaintiff's attorneys within five days after the arrest. The sheriff made the arrest as required by the order; and, within the time limited, delivered the order to the plaintiff's attorneys, with his return indorsed, and a certified copy of the undertaking of the bail. A copy of Rule 6 was not indorsed upon the order. The original affidavits and order of arrest were filed in the proper clerk's office by the plaintiff's attorneys within ten days after the arrest:

   Held, that the practice was strictly in conformity with the statute (*Code, secs.* 183, 184, 193) regulating the same. (*Forward* agt. *French, ante*, 88.)

2. Rule 6 of the general rules of practice of the supreme court, so far as it directs the sheriff to file the order with the clerk, seems to be in plain conflict with the terms of the order itself, which is in the form prescribed by statute (*Code, sec.* 188), and in conflict with the statute (*Code, sec.* 193), which directs the sheriff, within a time limited by the terms in the order, to deliver the order to the plaintiff or his attorney with his return indorsed thereon. (*Id.*)

3. Issues tried in a former suit cannot be retried in another between the same parties, upon allegations that one of the parties thereto and her witnesses conspired together to and did commit perjury in the former, by means of which a verdict and judgment were had against the present plaintiff, then defendant. (*Ross* agt. *Wood*, 8 *Hun*, 185.)

4. The proper course for the aggrieved party to pursue is to apply for relief in the action itself, by a motion for a new trial on the ground of surprise or newly discovered evidence, or other matter out of which his claim for relief arises. (*Id.*).

5. To obtain relief by an independent action in a court of equity against a judgment obtained through fraud and crime, it must appear that the party had no remedy at law in the action, and that there had been no fault or negligence on his part. A failure to promptly apply for appropriate relief in the action would be negligence; and that an application had been made without success, would afford no ground for a substantial review of such action, in another suit in a different court. (*Id.*)

6. A party, except in cases commenced in a justice's court, having a demand against another can maintain an action therefor, although at the time an action is pending against him by the same party, wherein he could have set up such demand as a counterclaim. (*Insles* agt. *Hampton*, 8 *Hun*, 230.)

7. If a party who is entitled to enter an order fails to do so for twenty-four hours after the decision has been made, any party interested may have it drawn up and entered. (*Matter of Rhinebeck and Conn. R. R. Co.*, 8 *Hun*, 34.)

8. Where the complaint is dismissed at the circuit, the court may direct the plaintiff's exception to such disposition of the case to be heard in the first instance at the general term, and that judgment be suspended in the meantime (*Hoagland* agt. *Miller* [16 *Abb. P.*, 103]

not followed). (*Brown* agt. *Conger*, 8 *Hun*, 625.)

9. Where, upon the trial of an equity case at the special term in the first district, an interlocutory decree is made directing a reference for certain purposes, a motion to confirm the report must be made at a special term for enumerated motions, and not at a special term and chambers for non-enumerated motions only. (*Empire B. and M. L. Assoc.* agt. *Stevens*, 8 *Hun*, 515.)

10. In an action to foreclose a mortgage, an inquest taken by the plaintiff upon the defendant's failure to file an affidavit of merits is irregular, and a judgment entered thereon will be set aside. (*Devlin* agt. *Shannon*, 8 *Hun*, 531.)

11. The refusal of a request to charge what has already been charged is not error, although the court neglect to give that as the reason for its refusal. (*Spencer* agt. *Humiston*, 9 *Hun*, 71.)

12. An attachment cannot issue under section 227, Code, in an action in which the complaint sets forth several causes of action, some of which belong to neither of the two classes therein described. (*Mining Co.* agt. *Raht*, 9 *Hun*, 208.)

13. Application under, to settle a sheriff's fees on an attachment, may be made before the justice issuing the attachment while holding a special term at chambers. (*German American Bank* agt. *P. and E. Coal Co.*, 9 *Hun*, 205.)

14. Upon an application for the distribution of the surplus moneys arising upon a sale under a foreclosure of a mortgage, no costs can be allowed except those particularly specified in the Code, viz., motion fees and the fees of the referee. The hearing before the referee is not a trial, and no extra allowance can be made. (*McDermott* agt. *Hennesy*, 9 *Hun*, 59.)

15. Where a party desires to review the report of a referee, made upon the reference of a disputed claim presented against the estate of a deceased person, he should move upon a case and exceptions for a new trial and to set aside the report, and if this application be denied an appeal should be taken from the judgment entered upon the report. (*Somerville* agt. *Crook*, 9 *Hun*, 664.)

16. In an action to recover for legal services rendered to the defendant's intestate by the plaintiff, the latter was allowed, against the defendant's objections and exceptions, to state that the services consisted of counsel and advice given by him to the deceased in relation to several matters, and that during a specified time he considered himself the counsel of the deceased. *Held*, that the evidence was inadmissible, as relating to personal transactions or communications with the deceased. (*Id.*)

17. Where it appears from the referee's minutes that certain evidence was objected to by the defendant, the terms used being "objected to by defendant," *held*, that the objection was insufficient to raise the point that it was inadmissible under section 399 of the Code. (*Id.*)

18. The mere fact that a defendant admits the service of the summons upon him as of a day prior to the day of its actual service, and that a judgment is entered before twenty days from the actual service of the summons have elapsed, does not render such judgment fraudulent as against the creditors of the defendant. (*Peck* agt. *Richardson*, 9 *Hun*, 567.)

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19. While this action was being prosecuted by the special administrator of the deceased plaintiff, an order was made on May 27, 1876, referring it to a referee to ascertain and report the extent of the liens of the attorney for the plaintiff, and of certain persons employed as associate counsel upon the judgment recovered herein. On the twenty-sixth of June an order was made substituting the appellants as executors of the last will of the deceased, in place of the special administrator, and on the twelfth of July an appeal was taken by them from the order of May twenty-seventh. *Held*, that the appellants took the proceeding into their hands, in the condition in which it was at the time of their substitution, and that as the time within which such order could be appealed from by the special administrator had elapsed, no appeal could be maintained by them. (*Brown* agt. *The Mayor*, 9 *Hun*, 587.)

20. Upon the coming in of the report, an order was made substituting the plaintiff in place of the special administrator, and sending the report back to the referee, with directions to him to take further testimony, upon notice to the plaintiff as therein provided. In pursuance of this order further hearings were had, at which the plaintiffs appeared and gave testimony. *Held*, that as such appearance was compulsory, they were not thereby deprived of their right to appeal from the order. (*Id.*)

21. An appeal from an order confirming a referee's report in such a proceeding is governed by the provisions of rule 39, and not by those of rule 40. (*Id.*)

22. This action was brought in pursuance of an agreement between the plaintiff and his attorney that, in case of a recovery, the attorney should receive, in addition to his taxable costs and disbursements, the sum of $5,000 and one-half of all interest allowed upon the claims prosecuted herein; thereafter the plaintiff recovered a judgment for $111,000, and subsequently, during the pendency of an appeal therefrom, settled the same for $50,000, against the objection of the attorney. Subsequently the attorney applied, upon a petition, to have it referred to a referee, to ascertain and report the extent of his lien upon the judgment. *Held*, that the agreement as to compensation was valid; that the court had jurisdiction to adjudicate summarily upon the extent of the attorney's lien, and to refer the matter to a referee to ascertain and report the facts relating thereto. (*Id.*)

23. Where a party, objecting to the confirmation of a referee's report in such a proceeding, limits his exceptions to the findings of fact and conclusions of law of the referee, no question is raised by them as to the admission of improper or illegal evidence, or as to any thing that occurred during the progress of the trial. If the party aggrieved desires to review these questions, he should specify, as part of his exception to the report, that it was founded on illegal evidence, and that the referee had improperly overruled his objection to the reception thereof. (*Id.*)

24. An attorney's lien upon a judgment may be established by ordering a reference for the purpose of ascertaining the same. The compensation due to counsel for services in a case, cannot, unless by consent of parties, be determined by such a summary application, but must be established in the form prescribed by law for the recovery of debts. (*Id.*)

PRESCRIPTION.

1. No acquiescence short of twenty years will bar one from complaining of a nuisance, unless by some

act or omission he has induced the party causing the nuisance to incur large expenditures, or to take some action upon which an estoppel may be based. (*Campbell* agt. *Seaman*, 68 *N. Y. R.*, 568.)

2. If a party may acquire a prescriptive right to continue a nuisance, it can only be by continuous use for twenty consecutive years. *Id.*

PRESUMPTION.

1. Where a bond and mortgage, given by a father, were found by his children at his death, amongst his papers, the same having been in the father's possession for many years, and no claim having been made for either principal or interest for a period of ten years, the presumption is, that the mortgagor and his children were lawfully in possession of the bond and mortgage, and that the same are paid. (*Levy* agt. *Merrill*, *ante*, 360.)

2. An action may be maintained to have a bond and mortgage declared to be of no validity, although the land upon which the mortgage is claimed to be a lien, has been sold by the heirs of the mortgagor, when a part of the consideration money, equal to the amount of the mortgage, has been retained and deposited in a trust company, to abide the event of an action to determine the validity of the bond and mortgage. (*Id.*)

3. *Townsend* agt. *Goelet* (11 *Abb. Pr.*, 187), distinguished. (*Id.*)

4. A cohabitation illicit in its origin, is presumed to continue to be of that character unless the contrary be proved, and cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage. (*Foster* agt. *Hawley*, 8 *Hun*, 68.)

5. Where a married woman, who has a separate estate and carries on business in relation thereto, keeping a bank account in her own name, draws a check upon such account, payable at a future day, on which she borrows money, the law presumes, in the absence of evidence to the contrary, that such money was borrowed for the benefit of her separate estate, and holds her liable therefor. (*Nash* agt. *Mitchell*, 8 *Hun*, 471.)

6. When the uncontradicted evidence establishes the existence of a fact essential to the plaintiff's right to recover, it will be presumed, in support of a judgment in his favor, that such fact was found by the referee, though not so stated in his report. (*Bancker* agt. *Mayor*, 8 *Hun*, 409.)

7. In an action by plaintiff for malicious prosecution, *held*, that where there was an entire want of reasonable grounds for believing the party guilty of the crime charged, that malice might be inferred from such want of probable cause. (*Wanser* agt. *Wyckoff*, 9 *Hun*, 178.)

8. Where, on a sale of personal property, there is no delivery, and no actual change of possession, the presumption is, the sale was not made in good faith. (*Schoonmaker* agt. *Vervalen*, 9 *Hun*, 138.)

QUESTIONS OF LAW AND FACT.

1. A voluntary conveyance by a husband through a third person to his wife is not necessarily or presumptively fraudulent as against creditors; the want of consideration is simply a circumstance bearing upon the question of fraud, which is a question of fact for the jury. (*Holden* agt. *Burnham*, 63 *N. Y. R.*, 74.)

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QUO WARRANTO.

1. The right to remove one who has unlawfully intruded into a public office is vested in the state alone, and its decision as to whether or not an action shall be brought to remove such intruder therefrom, is final and cannot be reviewed by the courts. (*People ex rel. Demarest* agt. *Fairchild*, 8 *Hun*, 384.)

2. In an action by the people on the relation of three persons, claiming to constitute a board of excise, against three others whom they allege have usurped the said office, it is not necessary to allege or prove that any one of the relators is entitled to the office occupied or claimed by any one of the defendants; the object of such action is to determine which set of persons lawfully compose or is entitled to compose the board of excise. (*People ex rel. Babcock* agt. *Murray*, 8 *Hun*, 577.)

RAILROADS.

See NEGLIGENCE.
Conroy agt. *Twenty-third Street R. R. Co.*, *ante*, 49.

1. The mere fact that a fire is occasioned by sparks emitted from the smoke-stacks of locomotives used by a railroad company does not, of itself, establish negligence on its part, nor would it be sufficient to authorize a jury to infer negligence, unless the emission of the sparks was unusual in degree or character, or the sparks were of an extraordinary size and such as would not be emitted from perfectly constructed locomotives. (*McCaig* agt. *Erie Railway Co.*, 8 *Hun*, 599.)

2. In a case not within such exception, the burden of proving that the railroad company did not exercise due precaution rests on the plaintiff. (*Id.*)

3. Upon the trial of an action to recover damages sustained from a fire started by sparks from a locomotive owned by the defendant, the judge charged the jury "if all the evidence satisfied them that there had been negligence on the part of the defendants, although they might not be able to satisfy themselves in what that negligence consisted, they would be authorized to find a verdict for the plaintiff." *Held*, that this was error; that if the jury could not find in the evidence any rational ground upon which to impute negligence to the defendants they should give a verdict in their favor. (*Id.*)

RECEIVER.

1. Receivers and trustees appointed in other states may sue as such in the courts of this state. (*Pugh* agt. *Hurtt*, *ante*, 22.)

2. The only ground on which our courts will refuse to receivers appointed by the courts of other states the privilege of suing here, seems to be where their claim comes in conflict with the rights of creditors in this state. Our courts will not sustain the lien of foreign assignees or receivers, in opposition to a lien created by attachment under our own laws, nor extend their courtesy so far as to work detriment to citizens of our own state, who have been induced to give credit to the foreign insolvent. In other cases comity demands that they should be allowed to sue. (*Id.*)

3. Where a complaint alleges that the United States Proprietary Medicine Company was a joint stock company, duly incorporated under the provisions of a statute of the state of Ohio; that at the time mentioned in the complaint the company was and still is insolvent, stating the acts of insolvency; that the act under which

the company was incorporated contains a provision that all stockholders shall be deemed and held liable to an amount equal to their stock subscribed, in addition to said stock, for the purpose of securing the creditors of said company; that the defendant was a stockholder owning shares of stock; also the due and proper appointment of the plaintiff as receiver in an action in the courts of Ohio; and an order made whereby he was directed to proceed at once to collect by suit the statutory liabilities of stockholders residing without the jurisdiction of said court by bringing suit against them in the proper courts of the states in which they reside; *held*, to be a complete statement of the cause of action. (*Id.*)

4. As a general rule, leave will not be granted by this court to sue a receiver appointed by its authority, in any other tribunal. (*Matter of Platt, ante*, 468.)

5. It is only when special facts and circumstances are shown to exist which render a departure from the regular course and practice of the court advisable, that such leave will be given. (*Id.*)

6. A general assignment for the benefit of creditors, without preference, has been held by the court of appeals of this state to be perfectly valid and unassailable under the bankruptcy act; but the federal courts in this district have held directly the reverse (*See McDonald, assignee*, agt. *Moore et al., N. Y. Weekly Digest, December* 25, 1876):

Held, that the power vested in the supreme court of the United States to review these decisions, does not abate the authority of the court of last resort in this state over its inferior tribunals, and hence, until this conflict is finally determined, the court should not grant leave to have its own officer sued in a tribunal which is known to administer the law in a different way from that which this court is bound to observe. (*Id.*)

7. Therefore, leave will not be granted an assignee in bankruptcy to sue, in the United States court, a receiver appointed by this court, the object of the suit being to cause him to turn over the property of the bankrupt in his hands as receiver, to the assignee in bankruptcy. (*Id.*)

See MUTUAL BENEFIT ASSOCIATION. *Lafond* agt. *Deems, ante*, 41.

8. In an action to recover the possession of real estate from one in possession thereof under a contract of sale, the court will not appoint a receiver thereof *pendente lite*. (*Guernsey* agt. *Powers*, 9 *Hun*, 78.)

RESCISSION OF CONTRACT.

1. Before a party can demand a rescission of a contract he must restore, promptly and completely, or offer to do so, what he has received under it, unless such restoration has been rendered impossible by the act of the party charged with the fraud. (*Anthony* agt. *Day, ante*, 35.)

2. The persons necessary to be made parties to such an action, considered. (*Id.*)

RECORDING ACT.

1. The effect of the statutory provision providing for the recording of contracts for the sale of land (1 *R. S.*, 762, *sec.* 39), is simply to preserve evidence and facilitate proof thereof. The record is not constructive notice to subsequent purchasers or incumbrancers, and no action can be maintained to cancel it as a cloud on title. (*Wash-*

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burn agt. *Burnham*, 63 *N. Y. R.*, 132.)

2. A certificate of acknowledgment of a deed, made after the adoption of that portion of the Revised Statutes relating to proof and recording of deeds, which simply describes the persons acknowledging as "grantors of the within indenture," without stating that they were known to the officer to be the same persons who are described in and who executed it, as prescribed by said statute (1 *R. S.*, 759, *sec.* 15), is sufficient to entitle the deed to be recorded. (*Fryer* agt. *Rockefeller*, 63 *N. Y. R.*, 268.)

3. A title by foreclosure sale is not defective because of a failure to record an assignment of the mortgage. There is no legal need of a record or of a written assignment; a good assignment may be made by delivery only. (*Id.*)

REFEREE.

1. The duty of a referee appointed under supplementary proceedings is to *take* and not to *make* the examination of the judgment debtor, and if he attempts to do so in an officious manner and partisan spirit he transcends his duty. (*People ex rel. Korotowsky* agt. *Leipzig*, *ante*, 410.)

2. A referee is only entitled to receive the same fees for selling real estate, as by law is allowed to a sheriff. (*Ward* agt. *James*, 8 *Hun*, 526.)

Report of, on passing accounts of receiver, how reviewed — Rule 39. (*See Matter of Guardian Savings Institution*, 9 *Hun*, 267.)

Right of, to allow amendment to pleadings so as to convert an action for use and occupation by one co-tenant into an action for an account under 1 Revised Statutes, 750, section 9. (*See Joslyn* agt. *Joslyn*, 9 *Hun*, 388.)

3. Under the old chancery practice, the report of a referee upon the passage of a receiver's accounts would only be reviewed upon petition in an independent proceeding. This practice was, however, abrogated by the adoption in 1858 of rule 32, under which, and rule 39 of 1871 and 1874, exceptions to such a report are to be filed within eight days after service of the notice of filing of the report, and the same may be then brought to a hearing at any special term thereafter, on notice by any party interested therein. (*Matter of Guardian Savings Institution*, 9 *Hun*, 267.)

REFERENCE.

1. A reference cannot be ordered, although a long account is involved, where the action is against a trustee of a corporation organized under the "manufacturing and mining law" of 1848, upon his liability under section 12 of that law, for the failure of the corporation to file its annual report. (*Hyatt* agt. *Roach*, *ante*, 115.)

2. Such an action is not upon contract, but is brought to recover a penalty. A compulsory reference cannot be ordered, although a long account is involved, where the action is brought to enforce a penal obligation. (*Id.*)

3. In the absence of any stipulation or agreement of the parties to extend the time within which the decision of a referee should be made and delivered, section 273 of the Code must govern. In such case, a notice from the party of an election to end the reference after the statutory time has expired, forecloses all further right to proceed, on the part of the referee. (*Ballou* agt. *Parsons*, *ante*, 164.)

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4. But where an oral agreement is made in open court, upon final submission, extending indefinitely the time within which the report may be made and delivered, the reference cannot be terminated in the manner provided by section 273 of the Code. The fairer and better rule of practice would *seem* to be, to require, in such a case, a notice to the party and referee, one or both, that unless the report is made and delivered within a reasonable time, to be specified, the reference will be deemed ended. (*Id.*)

5. *Gregory* agt. *Cryden* (10 *Abb.*, 289), *distinguished*. (*Id.*)

6. Upon taxation of costs, in an action tried by a referee, the clerk has no right to question the regularity of the referee's report. His decision, awarding judgment, stands before the clerk as the mandate of the court, and, until vacated and set aside on proper application to the court, its direction must be obeyed. (*Id.*)

7. In an action for divorce on the ground of adultery, where the defendant appears and in her answer denies each and every allegation contained in the complaint, except the allegation of marriage, an issue is joined which must be disposed of in some way authorized by law. It can be disposed of only by a trial, and there are but three modes of trial, viz.: 1, by jury; 2, by the court; and 3, by a referee. (*Sullivan* agt. *Sullivan*, *ante*, 453.)

8. In such action a trial may be had before a referee, by section 270 of the Code, which gives to parties an absolute right to a reference of the issues, provided they agree in writing to that effect; but the proper order for that purpose must be procured. (*Id.*)

9. An order of reference in an action for divorce, after issue joined, requiring the referee simply to take proof of all the material facts set forth in the pleadings, and to report the same to the court with his opinion thereon, confers no power to try, and is irregular. (*Id.*)

10. A referee is but the creature of the statute and an order, and as such possesses no greater jurisdiction than is delegated to him by the order. Authority is conferred upon him by a special grant for the purposes of each particular case. Unless the order of reference empower him to hear and determine the issues, he has no such power, and where no such authority has been conferred, there can be no trial of the issues. (*Id.*)

11. To confirm the report of a referee under such circumstances, and award judgment thereon on a mere motion, would amount substantially to a trial of the issues by the court upon affidavits. (*Id.*)

12. It is only in cases where no issue has been joined, or where some interlocutory question is involved, that a reference to simply take and report evidence is now allowable. (*Id.*)

13. The law, and the rules and practice of the court which govern references for the disposition of the issues in actions for divorce on the ground of adultery, very fully pointed out. (*Id.*)

14. Where the complaint in an action sets forth a claim composed of many different items, which might be united in one count as one cause of action, and where the trial of the issues require the examination of a long account, and so are referable under the Code (*sub.* 1, *sec.* 271), the fact that one item of the demand is stated in the complaint in a separate count, as a separate cause of action, and which, if alone sued upon, would not be referable, does not deprive the court of the power to refer

Digest.

(RAPALLO *and* EARL, *JJ., dissenting*). (*Place* agt. *Chesebrough*, 68 *N. Y. R.*, 315.)

15. An order refusing to send a case back to a referee to find in respect to request to find made to him, is not error, when the circumstance, if found as requested, taken in connection with the other findings, would not change or materially affect the conclusion arrived at by the referee. (*Quincey* agt. *White*, 68 *N. Y. R.*, 370.)

16. Referees appointed under the statute (*chap.* 455, *Laws of* 1847) to hear and appeal from an order of commissioners of highways laying out a highway, have no power to pass upon the question of the jurisdiction of the commissioners to make the order, but are confined to an examination of the case upon the merits, upon the assumption that the order is valid. (*People ex rel.* agt. *Harris*, 63 *N. Y. R.*, 391.)

17. As to whether a different rule would apply where the order of the commissioners refused to lay out the highway and the referees reversed such decision, *quære*. (*Id.*)

18. An action to recover damages for a breach of a contract to finish certain houses, on the ground that they were not completed and ready for occupancy as required by the contract, cannot be referred, under section 271 of the Code, on the ground that the trial of the action will require the examination of a long account. (*McDonnell* agt. *Stevens*, 9 *Hun*, 28.)

REFORMATION OF WRITTEN INSTRUMENT.

1. It is necessary, to entitle a party to a decree of a court of equity reforming a written instrument, for him to show first a plain mistake clearly made out by satisfactory proofs. (*Berringer* agt. *Schaefer*, *ante*, 69.)

2. In the second place he must show that the material stipulation which he claims should be omitted or inserted in the instrument, was omitted or inserted contrary to the intent of both parties, and under a mutual mistake. (*Id.*)

3. The burden of proof is upon the plaintiff, and before undertaking to alter the terms of the agreement as signed by the parties, the court should be satisfied beyond any reasonable doubt that the plaintiff has made out his case. (*Id.*)

REMEDY.

1. Where one joint owner of personal property assumes, without authority, to sell the interests of other owners, they may repudiate such sale and sue for the conversion of the property, or they may ratify it and sue for their share of the money received. (*Small* agt. *Robinson*, 9 *Hun*, 418.)

2. Where the provisions of a judgment entered upon the report of a referee as to an injunction are broader and more unlimited than authorized by the report, the error cannot be corrected upon appeal from the judgment; the remedy of the party aggrieved is to move to set aside or correct the judgment. (*Campbell* agt. *Seaman*, 63 *N. Y. R.*, 569.)

3. It is not an objection to a judgment of general term that one of three judges hearing the appeal died before the decision, and that it was made by the other two; two judges may hold a general term and decide cases there argued. (*Id.*)

REMOVAL OF CAUSE.

1. The petition and bond required to be given for the removal of a cause from a state court to the

United States circuit court, under the act of congress of 1875 authorizing such removal where litigants reside in different states, must be filed in the supreme court and not in the office of the county clerk. (*Rhode Island Horseshoe Co.* agt. *Goodenough Horseshoe Manuf. Co.*, *ante*, 111.)

2. Although the county clerk of New York county is *ex officio* the clerk of the supreme court, his office is not the supreme court, and the filing of the petition and bond with him will not work a removal. (*Id.*)

3. Under the act of congress, passed March 3, 1875, allowing a removal of causes from the state courts to the United States courts in certain cases (*U. S. Stat.*, 1875, *chap.* 137), an action in which there is a controversy between citizens of different states can be removed, even although, by reason of plaintiff being an assignee of one who was a citizen of the same state as defendant, original cognizance of the action could not have been taken by the United States court. (*Leutz* agt. *Butterfield*, *ante*, 376.)

4. An application to remove a cause into the United States court, under the act of 1867, on the ground of prejudice and local interest, cannot be made by a corporation aggregate, for the reason that in such case no affidavit can be made "by the defendant" as required by the said act, an affidavit by the president of the defendant not being a sufficient compliance therewith. (*Mix* agt. *Andes Ins. Co.*, 9 *Hun*, 397.)

RES GESTÆ.

Declarations in confirmation of prior statements of witness are not admissible as part of the *res gestæ* when they do not relate to or bear upon any issue raised in the case. (*See Howard* agt. *Upton*, 9 *Hun*, 434.)

RULE 6.

Rule 6 of the general rules of practice of the supreme court, so far as it directs the sheriff to file the order with the clerk, seems to be in plain conflict with the terms of the order itself, which is in the form prescribed by statute (*Code*, *sec.* 188), and in conflict with the statute (*Code*, *sec.* 193) which directs the sheriff, within a time limited by the terms in the order, to deliver the order to the plaintiff or his attorney with his return indorsed thereon. (*See Forward* agt. *French*, *ante*, 88.)

RULE 32.

Of 1858, and rule 39 of 1871 and 1874 — method of review of referee's report on receiver's accounts. (*See Matter of Guardian Savings Institution*, 9 *Hun*, 267.)

RULE 39.

Practice determined by — on appeal from an order confirming referee's report made on a reference ordered to ascertain and report the extent of an attorney's lien on the judgment recovered by his client. (*See Brown* agt. *The Mayor*, 9 *Hun*, 587.)

RULE 40.

Practice — on appeal from an order confirming a referee's report, made on a reference ordered to ascertain and report the extent of an attorney's lien on the judgment recovered by his client. (*Id.*)

RULE 7.

An appeal to this court is perfected when a notice of appeal and proper undertaking is served, and it is the duty of the appellant to serve

printed copies of the case within forty days thereafter (rule 7), and this although the sureties in the undertaking are excepted to, and proceedings for their justification subsequently taken. (*Wade* agt. *De Leyer*, 63 *N. Y. R.*, 318.)

SAVINGS BANKS.

See CORPORATIONS.
French agt. *O'Brien*, *ante*, 394.

SHERIFF.

1. A constable levied on certain property under a judgment in favor of the defendant, against the plaintiff, and committed the property to the defendant as a receiptor. *Held*, that the latter acquired a valid lien upon the property, for his just and lawful charges as such; that payment of the judgment to the sheriff, upon the judgment of affirmance rendered upon appeal to the county court, did not discharge the lien of the defendant, or of the constable for his fees. (*Aliger* agt. *Keeler*, 8 *Hun*, 125.)

2. The plaintiff recovered a verdict against one Frink for $346.04, and on the 26th of June, 1873, under an execution issued thereon, the sheriff levied on sufficient personal property to satisfy the execution. After the levy, proceedings in bankruptcy were taken against Frink, and the sheriff released the property levied on and returned the execution unsatisfied. On a suit against the sheriff therefor, he set up as defense:

1st. That pending proceedings in bankruptcy he (the sheriff) was enjoined from further proceedings on the execution:

Held, that this was no defense. For if it applied to the property levied on, the injunction neither commanded nor authorized the sheriff to release the same or discharge it from his levy. It simply restrained him from making *any* disposition of it. But it did not apply to the property levied on, as when a levy has been made before the commencement of proceedings in bankruptcy, the possession and legal title are in the sheriff for the purpose of satisfying the process in his hands, and he had the right to go on and sell the property, being accountable only for the surplus, if any, to the bankruptcy court.

2d. That the plaintiff directed the sheriff to retain the execution until requested to make a return thereof, and subsequently directed him to make a return immediately:

Held, that this was no excuse for discharging the property and releasing it from custody, especially as the direction was given upon the sheriff's advice and statement, that he would in the meantime hold his levy.

3d. That the United States marshal, by virtue of a warrant issued to him in said bankruptcy proceedings, and before the return of the execution, took possession of the property levied on:

Held, that this was no defense; that the taking by the marshal, even if done against the consent of the sheriff, was without authority and illegal, the sheriff having both the legal title and possession of the property; that, even supposing a yielding up thereof to a *vis major* would have afforded an excuse, the sheriff surrendered the property upon the mere exhibit of the warrant and demand of the marshal. The marshal had no authority to take it, and an application by the sheriff to the district court which issued the warrant would doubtless have resulted in an immediate release of the property, or of an amount thereof sufficient to have satisfied the execution; and it was the sheriff's duty to have resorted to all reasonable means to protect his levy, instead of surrendering it without objection or remonstrance.

Digest.

4th. That the plaintiff had proved the claim set forth in the complaint, in the proceedings in bankruptcy, before the commencement of his suit against the sheriff, and a dividend had been duly declared to the plaintiff on such proof of claim:

Held, that although section 21 of the bankruptcy act provides that "no creditor proving his debt shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against the bankrupt, and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby," yet the proof of the judgment in the bankruptcy court (admitting it was legally done) did not in any manner affect the liability of the sheriff for the previous unauthorized release of the property levied on. The intent of the section was only to prevent future proceedings against the bankrupt or his estate. The liability of the sheriff for releasing the property was a wholly collateral liability, arising from a breach of official duty, and did not constitute in this case any claim or security which could be enforced by the assignee in bankruptcy, to whom the property levied on had been delivered. (*Ansonia Brass and Copper Co.* agt. *Babbitt*, 8 *Hun*, 157.)

3. The term "criminal proceedings," as used in chapter 495 of 1847, providing for the payment by the several towns and cities, of all fees and accounts of magistrates and other officers for criminal proceedings instituted for certain offenses committed therein, embraces all necessary and legal actions by magistrates and ministerial officers having in view the punishment of public offenders and violators of public rights and duties, as distinguished from civil injuries. (*People ex rel. Van Tassel* agt. *Supervisors*, 8 *Hun*, 275.)

4. Where the sheriff of the county of Columbia rendered services in receiving, discharging and boarding prisoners committed to jail by the police justice of the city of Hudson for offenses committed therein, some of which were felonies; *held*, that even if some of the cases in which they were rendered did not fall within the strict definition of "criminal proceedings," yet as they were all rendered in other than civil proceedings, and in the line of his official duties he was entitled to compensation therefor.

A just allowance in such cases would be the amount fixed by statute for similar services in other proceedings. (*Id.*)

5. Under section 97 of chapter 468 of 1872, providing that the common council of the city of Hudson shall be the "board of auditors to examine the accounts of officers of the city, with the same powers and shall proceed in the same way as is prescribed by law for the board of town auditors in towns," the common council is not restricted to the examination and audit of the accounts of "officers" of the city, but it is vested with all the powers possessed by the board of town auditors of towns, and it is its duty to audit bills presented by the sheriff of Columbia county for services chargeable, under the act of 1847, upon the said city. (*Id.*)

6. This was an application for leave to issue an execution on a judgment purchased by the applicant while a deputy sheriff, and while an execution thereon was in his hands for collection, still in force, but under which no levy had been made. The purchase was made in 1867, and no execution had ever been issued by him thereon. *Held*, that there was no rule forbidding the purchase of a judgment under

such circumstances, and that the application should be granted. (*Albany City Nat. Bank* agt. *Kearney*, 9 *Hun*, 535.)

Liability of, for delivery of property held under replevin process—after service of notice of claim under section 216 of the Code. (*See Manning* agt. *Keenan*, 9 *Hun*, 686.)

Bond of indemnity to, on seizure of goods — "to keep, bear harmless and indemnify" — judgment against sheriff for such seizure — constitutes a breach thereof — sheriff need not pay judgment before suing on bond. (*See Johnson* agt. *Gilbert*, 9 *Hun*, 469.)

7. In an action brought against a sheriff for failure to return an execution, it is no defense that prior to the return day defendant received a warrant of attachment against the plaintiff, a copy of which he served upon the judgment debtor, and received a certificate acknowledging indebtedness to the plaintiff in the amount of the judgment. (*Wehle* agt. *Conner*, 63 *N. Y. R.*, 258.)

8. The attachment does not prevent the sheriff from collecting the execution, nor does the service of the attachment dispense with the duty imposed upon him of returning the execution. (*Id.*)

SHERIFF'S BOND.

1. The provision contained in section 3 of title 5, chapter 8, part 3 of the Revised Statutes, that upon due proof of any default or misconduct of the sheriff in his office "the court *shall* order" his official bond to be prosecuted, is not mandatory but permissive, and the court will not allow such action to be brought unless it believes it to be just and proper so to do. (*People* agt. *Conner*, 8 *Hun*, 533.)

2. Where, upon an appeal to the court of appeals from a judgment of the general term, affirming a judgment recovered against a sheriff for a failure to return an execution within the time allowed by law, the sheriff gives the bond required by the Code to stay all proceedings upon the judgment pending such appeal, the court will not allow an action to be brought upon the official bond of the sheriff until such appeal be decided. (*Id.*)

SPECIFIC PERFORMANCE.

1. Specific performance will be decreed, although there were unsatisfied liens on the premises when the title was to be closed, if at that time the holders of the liens attend, with the vendor, ready and willing to satisfy their liens simultaneously with the closing of the title. (*Rinaldo* agt. *Hausmann*, *ante*, 190.)

2. All that a purchaser can claim is that when he parts with his money he shall receive the title subject only to such liens as he agreed to assume, and when the holders of other liens are in attendance to discharge them simultaneously with the passing of the title he will, upon completing the agreement on his side, get what he bargained for. (*Id.*)

3. *Morange* agt. *Morris* (3 *Keyes*, 48; *S. C.*, 32 *How.*, 178) reviewed and held to be in conflict with the later case of *Hinckley* agt. *Smith* (51 *N. Y.*, 21). (*Id.*)

4. A parol promise by the owner of land to give it to another, accompanied by actual possession thereof by him, will be enforced in equity by a decree for specific performance, where the promisee, induced by such promise, has made substantial improvements, and expended considerable money upon the premises, with the knowledge of the promisor. (*Patterson* agt. *Copeland*, *ante*, 460.)

Digest.

5. Where A, with a view to aid his brother B, purchased a farm, and B entered, occupied and improved it, greatly enhanced its value by his own labor, and with his own means, and paid all taxes, and the interest on the purchase-money to A, year after year, under and pursuant to a parol agreement and understanding between them, that the premises should be his, on refunding to A the purchase-money:
Held, that contracts like this will be respected and enforced by the court, by a decree of specific performance. (*Id.*)

6. The question as to whether an action is against the defendants personally, or against them in their representative capacity as executors, is to be determined by the averments in the complaint, and where the facts stated and the prayer for relief fully characterize the action as one against them in their representative capacity, it is sufficient, although in the title to the cause they are not named as executors. (*Id.*)

7. An action to compel a specific performance of a contract entered into by the deceased, brought against his executors, does not *abate*, nor is it put in abeyance by the death of one of the three executors. The right of action and the ground of relief continues against the surviving executors; the decree could be against them the same as if their co-executors had lived. A suggestion of the death of the co-executor in the record is all that is necessary. (*Id.*)

8. An objection that there is a defect of parties, must be taken either by demurrer or answer, or it will be deemed to have been waived. (*Id.*)

9. In an action against executors for a specific performance of a contract, entered into by the testator, persons claiming through such testator are not necessary parties. The decree against the executors to make the conveyance would bind all parties claiming through the latter. (*Id.*)

10. The provision of section 399 of the Code, prohibiting a party, in certain cases, from testifying to a personal transaction or communication between him and a deceased person, does not preclude a party from testifying to statements made by a deceased person to a third party in the witness' presence, and this, too, even although the witness should participate in the conversation. (*Id.*)

11. In equity actions the court will look to the entire case and see whether substantial justice has been done, and when that appears it will affirm the judgment, notwithstanding the admission of testimony which, in ordinary actions at law, might have necessitated a new trial. (*Id.*)

STATUTE OF DISTRIBUTION.

1. When one possessed of personal property dies intestate, leaving no wife or descendant, parent, sister or brother, but leaves an aunt, and the children of deceased uncles and aunts, the aunt takes the entire estate under the statute of distributions as the nearest of kin, and is entitled to letters of administration; and in such a case no citation need issue to the cousins, as they have no interest in the estate of the decedent. (*Matter of Gooseberry*, *ante*, 310.)

2. If several persons claim letters of administration and the verified petitions of each set forth that the deceased died intestate, and left personal property within the state, oral proof, upon the hearing, is unnecessary to show the intestacy of the deceased, or that at the time of death he had personal property within the jurisdiction of the court. (*Id.*)

Digest.

3. The question of the costs of the administrator establishing relationship to decedent, should be reserved until the final accounting. (*Id.*)

STATUTE OF LIMITATIONS.

1. Where a payment, larger than any one item thereof, is made upon a claim for professional services with no directions for the special application thereof, and there are no circumstances from which such direction can be inferred, such payment is effectual to avoid the statute of limitations, and an action may be maintained upon such claim at any time within six years of such payment. (*Bowe* agt. *Gano*, 9 *Hun*, 6.)

2. Where goods have been purchased under fraudulent representations, and a note given therefor, and payments made thereon, after six years from the time of such representations, a right of action therefor is barred by the statute, the payments only keeping alive the note. (*Fritts* agt. *Slade*, 9 *Hun*, 145.)

3. Section 105 of the Code providing that when the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of actions, applies only to the limitations prescribed by the preceding sections, and not to limitations arising from the contract of the parties. (*Wilkinson* agt. *First Nat. Fire Ins. Co.*, 9 *Hun*, 523.)

4. Accordingly, where a policy of insurance provided that no suit should be sustainable, unless commenced within the term of twelve months next after a loss, *held*, that no action could be brought thereon after the expiration of that term, even though the plaintiff had, during the said twelve months, been restrained by injunction from commencing an action thereon. (*Id.*)

5. *Semble*, that in such a case the plaintiff must move to modify the injunction so that an action may be brought upon the policy, or else he must rely upon the undertaking given upon the issuing of the injunction. (*Id.*)

STAY OF PROCEEDINGS.

1. A county judge has power and is authorized to grant chamber orders. (*Strickland* agt. *Heuger*, *ante*, 130.)

2. A judge at chambers has no power to make an absolute, indefinite and continuing order, either to set aside or stay proceedings. (*Id.*)

3. The plaintiff had served a complaint, and a motion had been made by defendants to have it made more definite, &c., and an order allowing plaintiff to amend his complaint was entered by the Jefferson June special term; the plaintiff, availing himself of the order, served an amended complaint on September 9, 1876. The order of June special term gave defendants forty days after such amended complaint was served, to answer. October seventeenth, on notice of motion and affidavits, an order was granted by a county judge which reads, viz.: "On the foregoing affidavits and notice of motion, ordered, that the time for defendants to serve answer or demur in this action be extended twenty days *from date*, and all proceedings on the part of plaintiff be stayed accordingly:"

Held, that the order of October seventeenth, granted by the county judge, was authorized and valid. (*Id.*)

Digest.

4. Where, after a referee has been appointed to sell real estate, in pursuance of a judgment of foreclosure, and a notice of sale has been duly published, the defendant serves an undertaking to stay proceedings upon appeal, in pursuance of section 341 of the Code, the plaintiff is not required to abandon the proceedings instituted by him, but may adjourn the sale, until it can be determined whether or not the sureties will justify. (*Ward* agt. *James*, 8 *Hun*, 526.)

STEAMBOAT COMPANIES.

1. The defendants are rival steamboat companies organized under the act of 1854 (*Laws of* 1854, *p.* 518, *chap.* 232), and have been competing for the transportation of passengers and for public traffic for some years, the rivalry and competition between them being severe and keen. The tendency of this competition would naturally be for the benefit of the traveling public in reducing the rates of fares and freights. Suddenly these competitors come together and make an agreement for the purpose of running the boats of their respective lines for *joint* or *mutual benefit* or *account*, thus making a complete union of the interests of the two companies; at all events, providing for a joining of the companies for the protection of certain supposed *mutual interests*. *Held*, that such *combination* is in conflict with the provisions of section 22 of the act entitled "An act for the incorporation of companies formed to navigate the lakes and rivers," passed April 15, 1854, which provides that "No such company shall *combine* with any other company formed under this act for *any purpose*."

Held, *also*, that the creation or formation of such monopolies is contrary to public policy and injurious to the public, and is the very thing the legislature designed by the provision of the statute to prevent. (*Watson* agt. *Harlem and New York Nav. Co.*, *ante*, 348.)

2. The plaintiff, who is a stockholder in one of the corporations, sues on behalf of himself and of such other stockholders as shall elect to join in the action, joining both corporations as defendants. *Held*, that the action is properly brought. (*Id.*)

STILWELL ACT.

1. In order to obtain the warrant under the non-imprisonment act of 1831 (*Stilwell act*) two things had to be established: First, that defendant had assigned, removed or disposed of his property with intent to defraud his creditors; and second, that the defendant fraudulently contracted the debt or incurred the obligation respecting which suit is brought. (*Keiley* agt. *Dusenbury*, *ante*, 277.)

2. By section 4 of said act it is enacted that no warrant shall issue unless satisfactory evidence be adduced that there is a demand due plaintiff for which the defendant, according to the provisions of said act, cannot be arrested or imprisoned. (*Id.*)

3. By the fourth subdivision of section 179 of the Code, the defendant may be arrested when he has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought. (*Id.*)

4. An examination of the judgment roll in the original action shows that defendant could have been arrested in that original action, and if so, he cannot be arrested under the Stilwell act. (*Id.*)

5. Section 262 of the Code provides, "No person shall, on examination pursuant to this chapter (proceedings supplemental to execution),

be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution; nor shall he be excused from answering any question on the ground that he has before the execution executed any conveyance, assignment or transfer of his property for any purpose; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution." (*Id.*)

6. The only criminal fraud that could reach a case like this are those imposed by the Stilwell act. (*Id.*)

7. The act of 1831 contains a similar enactment, and prohibits the use of the examination against him. (*Id.*)

8. The supplementary proceedings fall within the provision of the statutes, and are not evidence against defendant. (*Id.*)

9. The provisions of the Stilwell act are in direct conflict with those of the bankrupt law, and inasmuch as a bankrupt cannot comply with the requirements of the Stilwell act, he ought not to be subjected to its penalties. (*Matter of Goldstein, ante*, 426.)

10. After an adjudication in bankruptcy, the bankrupt acquires an undeniable claim to the protection of the United States court, and where a state court, as in this case, attempts to interfere by the issuance of a "Stilwell warrant," causing the arrest of the bankrupt, an injunction will issue enjoining the state courts from prosecuting under said warrant. (*Id.*)

STIPULATION.

1. In an action against a railroad company to recover damages for injuries sustained by a passenger in consequence of being unlawfully ejected from its cars, defendant's counsel, as a condition for putting the cause over a circuit, stipulated that in case of the death of plaintiff before final judgment and determination of the action the alleged cause of action should survive, and any verdict and judgment be regarded as if rendered in plaintiff's lifetime; and also, that in case of such death plaintiff's representatives might be substituted as plaintiff. *Held*, that the stipulation continued in force until final judgment, although meanwhile a verdict and judgment in plaintiff's favor had been set aside. (*Cox* agt. *N. Y. C. and H. R. R. R. Co.*, 63 *N. Y. R.*, 414.)

2. Also, *held*, that the stipulation was one the attorney for defendant or its counsel (it having been conceded that the counsel had the same authority as the attorney) had power to make; that the court had the authority to impose the condition; that it was not against public policy, and was binding upon defendant. (*Id.*)

3. A verdict and judgment obtained in plaintiff's lifetime having been set aside, plaintiff died before a second trial, and his executors were substituted. Upon the second trial the objection that the action did not survive was taken and overruled. *Held*, no error; that plaintiff's representatives might have proceeded with the action in the name of the original plaintiff, but their becoming parties to the record was no insuperable objection to a judgment in their favor; and that the stipulation was a sufficient answer to the objection. (*Id.*)

STOCKHOLDER.

1. A complaint averring that there are only five trustees of a company; that the plaintiff was a

stockholder when the action was brought; that three of such trustees, who were the persons charged with committing a fraud, were made defendants, and that the action is brought in behalf of all other stockholders who will join, comes within section 119 of the Code, and a demurrer interposed thereto on the grounds "that the plaintiff has not legal capacity to sue: 1st. Because the plaintiff only became a stockholder after the matters complained of occurred; 2d. Because the statutes of this state restrict the power to bring actions of this nature to the people of the state, through their attorney-general, and to creditors of the company; 3d. That the Smith and Parmelee Gold Company alone had the right to maintain the action, and had never been requested so to do," will not be sustained. (*Young* agt. *Drake*, 8 *Hun*, 61.)

2. Although the general rule is that an action of this kind must be brought by the corporation, yet where the complaint shows that the corporation is still controlled by the same trustees who are accused of the fraud, or where such accused persons are a majority of the trustees, it is sufficient evidence that the corporation will not prosecute, and that an application to the trustees to direct a suit to be brought against themselves, or the derelict majority of their members, would be useless. (*Id.*)

3. A purchase of stock, after an alleged fraud is committed, does not condone the fraud, and the purchaser acquires all the rights of the person of whom he purchased. (*Id.*)

STREETS AND AVENUES (NEW YORK CITY).

1. Chapter 483 of Laws of 1862, page 966, entitled "An act to prevent fraud in the opening and laying out of streets and avenues in the city of New York," does not apply to proceedings of this character. (*People ex rel. Seaver* agt. *Green*, *ante*, 440.)

2. The special purpose of the proceedings in this matter was to acquire title to the lands, within certain specified limits, for a boulevard or public drive, to be adapted and set apart for purposes of ornament, exercise and amusement. They were not carried on to open and lay out a street or avenue in the sense in which these words are used in the statute of 1862. The compensation of the commissioners is, therefore, not limited to thirty cents per foot for the lineal extent of the avenue opened as provided in the statute above referred to. (*Id.*)

SUBMISSION OF CONTROVERSY.

1. The provision of the Code authorizing the submission of a controversy without action (*sec.* 372) only contemplates the determination of questions between the parties and affecting their interests, and the court has no power to go beyond a decision affecting such interests. (*Un. Nat. Bk.* agt. *Kupper*, 63 *N. Y. R.*, 617.)

SUBPŒNA DUCES TECUM.

1. It is well settled that a party examined as a witness, either at or before the trial, may be required, upon a *subpœna duces tecum*, to produce his *books* or *papers* relating to or containing evidence pertinent to the issues in the action. (*Smith* agt. *Macdonald*, *ante*, 117.)

2. There is no discrepancy between the provisions of sections 390, 391 of the Code, which authorize compulsory examination of a party as a witness, at the instance of the

adverse party before trial, and the privilege accorded by section 388, under which, in certain cases, an inspection and copy of books and papers containing evidence relating to the suit may be obtained through the order of the court, or a justice thereof, in their discretion, and it would be unreasonable and unjust to withhold the process of *subpœna duces tecum* merely because a *discovery* is also allowed under certain special circumstances. (*Id.*)

SUPERSEDEAS.

See ARREST.
Standacher agt. *Pregenzer*, *ante*, 76.

SUPPLEMENTAL COMPLAINT.

1. A supplemental complaint is a pleading, and as such is amendable once, as of course, in pursuance of section 172 of the Code. A new cause of action can be set up as well in an amended pleading as in an original. (*Divine* agt. *Duncan*, *ante*, 446.)

2. The representatives of a deceased defendant may be joined with a surviving defendant in an action upon a joint liability where the insolvency of the surviving partner is averred. (*Id.*)

SUPPLEMENTARY PROCEEDINGS.

1. Where a creditor seeks to compel a third person to appear and be examined under section 294 of the Code, as to whether he has any property belonging to the judgment debtor, his affidavit must be positive, not on information and belief. It must present the question whether the person had such property in his possession and not merely the belief of the attorney or creditor on the point. (*Day* agt. *Lee*, *ante*, 95.)

2. The duty of a referee appointed under supplementary proceedings is to *take* and not to *make* the examination of the judgment debtor, and if he attempts to do so in an officious manner and partisan spirit he transcends his duty. (*The People ex rel. Korotowsky* agt. *Leipzig*, *ante*, 410.)

See STILLWELL ACT.
Kieley agt. *Dusenbury*, *ante*, 277.

3. Where a receiver, appointed in proceedings supplementary to execution, brings an action to set aside, as fraudulent, a conveyance made by a husband to his wife, and obtains a judgment therein directing a sale of the land, such sale must be made subject to the wife's inchoate right of dower; the court has no authority to direct the payment to the wife of the estimated value of her inchoate right of dower in lieu thereof. (*Lowery* agt. *Smith*, 9 *Hun*, 514.)

4. Under section 292 of the Code a non-resident of this state who has no place of business herein, can only be examined in proceedings supplementary to execution in the county in which the judgment roll was filed.

5. Where, however, he has a place of business within this state he may be examined in the county in which such business is carried on, if a transcript of the judgment has been filed therein and an execution issued thereon. (*Anway* agt. *David*, 9 *Hun*, 296.)

SURETIES.

1. The lowest bidder for a contract for public work in the city of New York is not absolutely and of right entitled to the contract until he

has given adequate security, and such security has been passed upon and approved by the comptroller. (*People ex rel. McKone* agt. *Green, ante*, 304.)

2. Where sureties, originally good, have become inadequate during the time the comptroller refused to act or pass upon their sufficiency, the commissioner of public works, under the city ordinances, may accept new sureties; but such acceptance is an act of grace and may be reconsidered and withdrawn, for good and sufficient reasons, at any time before the comptroller has approved of their adequacy and sufficiency. (*Id.*)

SURROGATE.

1. The statute requires that before any surrogate shall take any proceedings to try any issue raised upon the probate of a will, he shall cite all persons interested to appear before him; but there is nothing in the statute to indicate that after he has obtained jurisdiction by the service of a citation upon *some* of the persons interested, that that jurisdiction shall not continue until the proceedings are terminated. (*People ex rel. Weatherhead* agt. *Waldron, ante*, 221.)

2. The service of a citation upon one of the parties interested gives to the surrogate issuing it, if regularly issued, jurisdiction of the proceedings until completed. (*Id.*)

3. It is not necessary, in order that a surrogate should acquire jurisdiction to try the question of *inhabitancy*, that citation should be issued and served upon *all* the parties entitled to notice of the propounding of a will for probate and proceedings had upon the return day of such citation. (*Id.*)

4. The surrogate of the county whose citations were *first* issued and served upon a proper application being made, acquires jurisdiction to try the question of *inhabitancy*. (*Id.*)

5. Where the will of deceased had been presented for probate to the surrogate of the county of New York, said surrogate, by the issuance and service of citation upon one of the interested parties, having acquired jurisdiction to try the question of the residence of deceased, afterward a certain other paper purporting to be the last will and testament of deceased was presented for probate to the surrogate of Saratoga county, and thereupon the said surrogate issued citation to the heirs at law and next of kin of deceased, and on the return day, upon objection being made to his jurisdiction, on the ground, among others, that deceased was at the time of his death a resident of the county of New York, which objection was overruled by said surrogate, and he proceeded to try the question of the residence of deceased; whereupon a writ of prohibition was issued out of this court, prohibiting the surrogate of Saratoga county from proceeding in the matter of the probate of said will. On demurrer to the return:

Held, that the return to the writ of prohibition was insufficient unless it contained a *positive* allegation that the deceased resided in Saratoga county at the time of his death. (*Id.*)

TRADE-MARK.

1. Where the plaintiff executed a release of his theater which he had built corner of Sixth avenue and Twenty-third street, in the city of New York, and which he called "Booth's theater," to Junius B. Booth; *he* afterwards assigning his lease to the defendants, the premises in both instances being designated as "Booth's theater;" the plaintiff also executed several mortgages in which the premises

are described by metes and bounds, to which description is added the words "being the premises known as Booth's theater in the city of New York;" under a foreclosure of one of the mortgages, the receiver duly appointed in the foreclosure proceedings by direction of the court, executed an agreement by which the defendants were accepted as tenants "of the property known as Booth's theater," and since this agreement, up to the present time, the defendants have been carrying on the theatrical business at said theater, designating the same as "Booth's theater," but representing themselves as the lessees and managers:

Held, that the plaintiff was not entitled to an *injunction* to restrain the defendants from using the name "Booth" in connection with the theater heretofore known as "Booth's theater," of which the defendants are the lessees.

Held, *also*, that the plaintiff, by his acts, has affixed his name to the theater so that his grantees and their successors have the right to call this building "Booth's theater," the name which he has given it. (*Booth* agt. *Jarrett*, *ante*, 169.)

2. A defendant will not be restrained by injunction from the use of his own name, which he has caused to be registered and recorded as a trade-mark in the patent office, on motion of a plaintiff by the same name and engaged in the same business, unless it plainly appears that it was obtained for the purpose of deception, or with a view to mislead the public or injure the plaintiff. (*Decker* agt. *Decker*, *ante*, 218.)

3. *It seems* doubtful whether in a collateral proceeding the court is empowered to restrain a party from the use of a trade-mark, awarded to him in the established course of procedure, by the commissioner of patents. (*Id.*)

4. Where the answer and affidavits of defendants thoroughly and completely deny the whole equity of plaintiff's case, as set forth in their complaint and affidavits, and thoroughly rebut all charges of evil intent and improper design in obtaining the trade-mark, an injunction will not be granted. (*Id.*)

5. *It seems* that it is improper to grant a preliminary injunction, except in cases where the injunction is absolutely necessary for the protection of the plaintiff's rights and the furtherance of justice. (*Id.*)

TRIAL.

1. On the trial of an action for work and labor done and materials furnished by the plaintiff for the defendant, after the jury had retired they requested of the court information as to what a witness for defendant had testified to, in reference to a portion of the work claimed for. *Held*, error for the court to refuse the request of the counsel for the defendant, made in the presence of plaintiff's counsel, to bring in the jury and state the evidence to them as requested. (*Drew* agt. *Andrews*, 8 *Hun*, 23.)

2. When the jury had returned into court, and stated that they had found for the plaintiff but fixed no amount, *held*, error for the court to direct the jury to take the pleadings and return again and fix the amount. The pleadings were not evidence even, beyond the portion thereof admitted in the answer. (*Id.*)

The hearing before a referee on application for distribution of surplus moneys, is not a trial. (*See McDermott* agt. *Hennesy*, 9 *Hun*, 59.)

3. Where, upon the taking of the deposition of a witness *de bene esse*, the opposing party is present in person, or is represented by counsel, and the witness refuses to an-

swer proper and material questions, the objection must be availed of upon the examination, or afterwards by motion before the trial; the party cannot wait until the trial and then object to the reading of the deposition, or move to suppress it. (*Sturm* agt. *A. M. Ins. Co.*, 63 *N. Y. R.*, 77.)

4. The rule requiring evidence corroborative of that of an accomplice is one of practice, not of law; a jury may convict upon his uncorroborated testimony. (*Linsday* agt. *People*, 63 *N. Y. R.*, 143.)

5. It is within the discretion of the court below whether to compel an election between two causes of action stated in the same count of a complaint; also, whether to require them to be separately stated and numbered, and its refusal so to do is not reviewable here. (*People* agt. *Tweed*, 63 *N. Y. R.*, 194.)

6. In an action to annul a marriage upon the ground of lunacy of the husband, the court charged in substance, that plaintiff must show undoubted unsoundness at the time of the marriage, continuing, beyond question, to the husband's death without lucid intervals. *Held*, that if the latter part of the charge was error, the objection was obviated by the finding of sanity at the time of the marriage. (*Banker* agt. *Banker*, 63 *N. Y. R.*, 409.)

7. The court refused to charge that the jury should start with the presumption that the husband was of unsound mind. *Held*, no error; that the presumption was of sanity and the burden of proof was with the plaintiff; that, while the inquisition changed the necessity of proof to the defendant, the affirmative still remained with plaintiff. (*Id.*)

UNDERTAKING.

1. The contract of the sureties in an undertaking given upon appeal, in pursuance of the requirements of the Code (*secs.* 234, 835) is simply that of suretyship. (*Wood* agt. *Fish*, 63 *N. Y. R.*, 245.)

2. Where the language of such an undertaking was "we" * * * (giving names of sureties) "do hereby, pursuant to the statute in such case made and provided, undertake," &c., *held*, that the obligation was joint only, not several. (*Id.*)

3. Also, *held*, that upon the death of one of the two sureties in the undertaking, his estate was discharged both in law and in equity, and the survivor only was liable. (*Id.*)

4. The fact that the obligation was given in pursuance of a statute does not alter its plain import, or affect the liability thereunder. In cases of suretyship, the contract is the measure of liability, and a statute under which it is made will not be so construed as to enlarge the obligation of the surety beyond the terms of contract. (*Id.*)

UNLAWFUL IMPRISONMENT.

1. The plaintiff was convicted of a crime punishable by fine or imprisonment. The United States district court, over which the defendant presided as judge, imposed both. The plaintiff paid the fine and applied to be released, because he had suffered one of the alternative punishments provided for the offense. The application was denied and the court directed the sentence pronounced to be vacated, and then sentenced the plaintiff to one year's imprisonment under his conviction (authority to so change the punishment having been previously held by the supreme court of the United States to exist). On return to a writ of *habeas corpus* and a writ of *certiorari* issued by the United States supreme court, the plaintiff was

discharged from custody, the court holding that he could not lawfully be sentenced to imprisonment after what had transpired in the case. The plaintiff thereupon brought this action for unlawful imprisonment. *Held*, that it could not be maintained. (*Lange* agt. *Benedict*, 8 *Hun*, 362.)

2. Where, in the course of a judicial proceeding, a judge is required to pass upon a question, the law as to which is in such a condition as to afford ostensible support to each side of the proposition presented, so that different minds might well, and naturally would, be led to different conclusions as to the proper course to be pursued in disposing of the case, a judge cannot be held personally liable for a decision made by him in good faith, and without malice, even though an appellate court should subsequently reverse such decision, and hold that the judge had no power to render or enforce the same. (*Id.*)

3. Especially is the judge exempt from personal liability, when his action is founded upon a decision of an appellate tribunal to which he is bound to conform, affirming the existence of the authority exercised by him in passing the sentence in question. (*Id.*)

USURY.

1. Where a mortgagor paid to the holder of the mortgage $100 in addition to the lawful interest to procure an extension of the time within which to pay the debt secured by the mortgage: *Held*, that the security given for the original debt was not impaired by such payment, but the amount so paid should be applied as a payment on the mortgage debt. (*Abrahams* agt. *Claussen*, *ante*, 241.)

2. By the payment of $100 besides the lawful interest the mortgagor secured an extension of the mortgage for three years. The bond accompanying the mortgage required the interest to be paid semi-annually. In an action to foreclose the mortgage for default in the payment of an installment of interest which became due November 1, 1875: *Held*, that the extension of the mortgage did not postpone or extend the time to pay the interest, the time for such payment remained unaltered, and the action for foreclosure was properly brought. (*Id.*)

3. Where G., on the application of L., agreed to advance moneys, and take an assignment of two valid mortgages made by L., and which mortgages were due and held by one T., the agreement being that L. should extend the payment of both mortgages, and should advance the further sum of $3,000, to be secured by a mortgage to be made by L., and that L. should pay to G. a bonus of ten per cent upon the moneys advanced for the accommodation and for the forbearance; the $3,000 mortgage being made, in part, to raise the funds with which the ten per cent bonus was to be paid, and which was actually paid thereout:

Held, that the two mortgages first above mentioned, of which an assignment was taken by G., the full amount of principal and interest thereon being paid to T., the holder, were valid securities in the hands of G. (*Langdon* agt. *Gray*, *ante*, 387.)

4. Also, that the $3,000 mortgage made to cover the ten per cent bonus was usurious and wholly void. (*Id.*)

5. And where, after the expiration of the year above named, a further bonus of ten per cent was exacted by G. and paid by L. for a further extension of a year, *held*, that the sum paid by way of bonus should be credited on the

two mortgages first above mentioned. (*Id.*)

6. Where a chattel mortgage was made to secure, in part, a valid debt, and in part the payment of a note given upon an usurious agreement, *held*, that the chattel mortgage could only be enforced to the extent of the valid debt, and as to the residue it was void. (*Id.*)

7. An agreement to pay interest, upon interest at the time due and unpaid, is valid and binding. (*Guernsey* agt. *Rexford*, 63 *N. Y. R.*, 631.)

VENUE.

1. A plaintiff may amend his complaint of course, within the time prescribed by section 172 of the Code for such purpose, changing the place of trial. But the exercise of such right, by the language of the statute authorizing it, *cannot prejudice proceedings already had.* (*Moulton* agt. *Beecher*, *ante*, 182.)

2. Where a notice of motion to change the place of trial had already been given by the defendant, the plaintiff, by an amendment of his complaint, sought to remove the cause from the locality originally designated in the complaint, thus seeking to prevent the court, upon the motion then noticed, from exercising its own independent judgment as to the place best fitted to try the action with impartiality to both parties:

Held, that the act of the plaintiff in making such change could not defeat the motion of which notice was given or the discretion of the court as to the proper place of trial. The motion cannot in any way be prejudiced by the amended complaint. (*Id.*)

3. Where, as in this case, the parties concerned hold prominent positions, the matters involved having been continually discussed for a long period by the public press, and by nearly every individual in the community, and a long and exhaustive trial having been had against the same defendant, continuing six months, daily reported in the papers, and continually and feelingly discussed, such trial resulting in a disagreement of the jury:

Held, that the obtainment of a fair, impartial and intelligent jury in such county would be an impossibility, and a motion for a change of venue is fully justified. (*Id.*)

4. A cause should not be tried in a locality the general sentiment of which one of the parties to the action has sought, by appeals through the public press, to control, and which he has himself selected as a place of trial. (*Id.*)

5. The fairness of a trial should be above and beyond suspicion, and the court should not allow a trial by a jury of a vicinage, the general opinion and belief of which, upon the matters involved in such trial, either party has industriously, through newspapers, sought to form. (*Id.*)

VERDICT.

1. Where, in an action of slander in which the evidence would have justified a verdict for the defendant sustaining the justification set up in the answer, the jury found a verdict for the plaintiff for six cents, *held*, that as the damages to which the plaintiff was entitled were not fixed or certain, and were incapable of being rendered so, that the amount thereof was wholly in the discretion of the jury, and that an order granting a new trial, on the ground that the damages awarded were insufficient, should be reversed. (*Wavle* agt. *Wavle*, 9 *Hun*, 125.)

Digest.

VERIFICATION.

1. Where, at the time of serving a notice to foreclose a mechanic's lien, a bill of particulars was served, sworn by the claimant to be "in all respects true, to the best of his knowledge and belief," *held*, that the verification was sufficient. (*Grey* agt. *Vorhis*, 8 *Hun*, 612.)

WAIVER.

1. Failure to serve in an action to foreclose a mechanic's lien, the bill of particulars required by section 10 of chapter 402 of 1854, is waived by the service of an answer, and cannot be taken advantage of on the trial. (*Norcott* agt. *First Baptist Church of Rome*, 8 *Hun*, 639.)

WARRANTY.

1. Where the contract for the sale and delivery of goods, wares and merchandise is executory and there is no express warranty, the vendee must examine the article furnished as soon after he has accepted the same as practicable; and in case it does not correspond with the contract he must immediately return or offer to return it to the vendor, or at least notify him of the defects; and if he fails so to do, he will be presumed to have accepted it in full performance of the contract, and waives any claim for damages he may have by reason of the breach. (*Greenthal* agt. *Schneider*, *ante*, 133.)

2. Where, upon a sale of a large quantity of butter, it was shown upon the part of the defendant that when the plaintiff first offered the butter for sale he stated that it was "good, excellent butter:"

Held, that this statement was merely descriptive of the quality of the article proposed to be sold, but not amounting to a warranty.

Held, also, that even if an express warranty could be predicated upon the representations respecting the butter, it would, in this case, only go to the extent that the article itself was of a particular kind or quality, and not that it was fit and suitable for the use to which the defendant applied it. (*Id.*)

3. Where parties stipulate that articles to be manufactured shall be of a particular kind and quality, and at the same time stipulate that they shall be tested by some person selected by the purchaser before delivery, to ascertain whether they are of the specified kind and quality, and such test is in fact made by him, and the goods are thereupon delivered and accepted, there is, in the absence of fraud and collusion between the manufacturer and the person selected to test the goods, no remedy by action upon the contract, even though the goods, or some portion of them, are subsequently ascertained not to be equal to the warranty. (*McParlin* agt. *Boynton*, 8 *Hun*, 449.)

4. The plaintiff agreed, in writing, to manufacture for the defendant certain saws of the "best cut steel, hardened and tempered, carefully ground to three gauges thin on back and filed, set and warranted best in every particular. The saws to be tested by your man employed for the purpose of filing and finishing same." *Held*, that the defendant having appointed a man to test the saws in pursuance of the contract was bound by his decision, and could not thereafter set up a breach of the warranty as a defense to an action for the purchase-price. (*Id.*)

5. The contract further provided that "all saws not taken by you in sixty days from completion of their manufacture we shall charge thereon interest at the rate

of ten (10) per cent per annum." *Held*, that this meant that if, for any reason, defendant was not in readiness to receive the saws within sixty days, and their delivery was thereby postponed beyond that period, he should pay ten per cent for the period that might elapse between the expiration of sixty days from manufacture and the time of delivery. (*Id.*)

WILL.

1. Where M., about to execute her will, sent for B. to be a witness thereto, who, when he came into the presence of M., the will lying on the table before her, was asked by P., who had written the will, to sign it as a witness to her will, such request being made in the hearing of M., B. then signed the will as a witness in the presence of M., who said "thank you;" the witness B. testifying that he did not see M. sign the will, and could not say whether or not her signature was to the will when he signed it, the other witness, P., testifying that M. signed the will in the presence of all the witnesses:

   Held, that the positive recollection of one witness will not be overcome by the non-recollection of the other, and that the certificate of a deceased witness that the testatrix "had signed, published and declared the instrument to be her last will and testament in the presence of the witnesses," should be received as evidence and have a controlling influence under the circumstances of this case; and that it thus appearing that the signature of M. was to the will when B. signed as a witness, the execution of the will was sufficiently proven. (*Morris* agt. *Porter*, *ante*, 1.)

2. The will contained a clause in these words "I do hereby give and bequeath the income, or incomes, arising from all my real estate to my children living at the time of my decease, to have and to hold the same during the term of each of their natural lives; and at the decease of my said children I give and bequeath to my grandchildren all my said real estate, share and share alike, to have and to hold the same forever. And it is my will and desire that my said real estate is not to be sold during the lives of said children."

   Held, that the devise was void for the reason that, thereby, the absolute power of alienation of the real property was suspended for a longer period than the continuance of two *lives* in being at the death of the testatrix. (*Id.*)

3. By the will certain real estate was devised to the defendants, who were sons of the testator as tenants in common. Each of these devises was declared to be "upon this express condition, that he pay, or cause to be paid, such legacies, and perform such acts and pay such moneys as I shall herein enjoin upon him to perform." The legacy bequeathed to the plaintiff, Ann Eliza, by the will, and which is the subject of this litigation, is in these words: "Fifthly. I give and bequeath unto my daughter Ann Eliza $400; to be paid unto her one year and one day after my decease, provided she has lawful issue, and if she has no lawful issue, then I order and will that my two sons pay to her the interest of the $400 yearly, and every year during her natural lifetime, and after her decease I give and bequeath the said $400 unto my surviving daughters, and their children, if they should have, deceased, and if, and when she shall have issue, the money shall be paid to her." The codicil declares: "And whereas in my said last will I have given unto my daughter the sum of $400, now, it is my will, that if my said daughter Ann Eliza die without lawful issue, then the same is hereby given to my daughters, and not to my sons, to be divided to my said

daughters equally." The testator died October 6, 1847, and the will was admitted to probate November 6, 1847. On the day the codicil to the will was prepared the testator gave to his daughter, Ann Eliza, the plaintiff, the sum of $400 in money, saying to her, "take this as a present from your father." The husband of the plaintiff, at the same time, signed a note for it, but has never been called upon to pay the note. A similar sum was handed to the other daughters, accompanied with the same remark. The husband of the plaintiff, in the years 1848, 1849 and 1850, made a demand of the plaintiffs, of the interest due his wife, which was refused, claiming that the legacy had been paid by the testator during his lifetime. This action was commenced in 1876:

Held, that the legacy was extinguished and paid during the testator's lifetime. The mere fact of taking the note of the plaintiff's husband was not inconsistent with the ademption of the legacy, the bequest of which legacy was never that of an absolute gift to the daughter, unless she had issue, but only of the income during life. Nor is the presumption of the ademption of the legacy overcome by the clause in the codicil. (*Degraaf* agt. *Teerpenning*, *ante*, 313.)

WITNESS.

1. The testimony of one who is next of kin and interested in the event of an action, although not a party thereto, as to conversations with defendant's intestate, whether it be favorable to or against his interest, is inadmissible, under section 399 of the Code. (*Le Clare* agt. *Stewart*, 8 *Hun*, 127.)

2. The rule, that where a disinterested witness testified to the existence of a fact within his own knowledge, and nothing appears to discredit his statement, which is not inherently improbable, neither the court nor the jury can arbitrarily reject it, does not apply to the evidence of a person whose interest it is to establish the truth of what he swears to, as where he is to receive the fruits of the litigation, either partially or wholly, in case it may prove successful. (*Sheridan* agt. *Mayor*, 8 *Hun*, 424.)

3. The uncontradicted evidence of a party, or other interested witness, is not necessarily conclusive upon either the court or the jury. (*Id.*)

When a party to an action is required to attend before a judge to be examined as a witness under section 391 of the Code, has appeared by attorney, notice of such examination must be served on the attorney as well as the party. (*See Plummer* agt. *Belden*, 8 *Hun*, 455.)

4. An accomplice is, in all cases, a competent witness for the prosecution on the trial of a criminal action. (*Lindsay* agt. *People*, 63 *N. Y. R.*, 143.)

5. It is in the discretion of the court to determine whether he shall be permitted to become a witness, and the exercise of this discretion is not reviewable upon error. (*Id.*)

6. His competency is not affected by the question as to the extent of his own criminality, *i. e.*, as to whether he was more or less guilty than the accused; this simply goes to his credit with the jury. (*Id.*)

7. If jointly indicted with the accused, the court, at the request of the prosecuting officer, may, in its discretion, direct a *nolle prosequi* to be entered so that the accomplice may become a witness. (*Id.*)

8. There is no practice in this state requiring a previous application or a formal order of the court to permit an accomplice to become a witness. (*Id.*)

Digest.

WRIT OF ERROR.

1. Upon the trial of the plaintiff in error for rape, the court refused to charge that he must have "accomplished his purpose in spite of the utmost reluctance and resistance on her part." The prisoner was convicted of an assault with intent to commit rape. Upon a writ of error to review this conviction, *held*, that as the refusal to charge, even if it were error, did not in any way affect the crime of which he was convicted, but only that of which he was acquitted, it furnished no ground to reverse the judgment. (*Myer* agt. *People*, 8 *Hun*, 528.)

While a substantial error in the admission of testimony in a capital case may not be overlooked because the objection was not technically correct; a mere formal objection, to be available on error, must be specifically made. (*Murphy* agt. *People*, 63 *N. Y. R.*, 590.)

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